

against each of the named plaintiffs. This motion was denied as well.

Prior to trial, the parties tendered a number of motions *in limine*. One of plaintiffs' motions sought to bar State Farm from presenting evidence to the jury that the regulation of insurance varied from state to state, and another of plaintiffs' motions sought to prohibit any disclosure of the states where the class members' policies were filed. Still another of plaintiffs' motions sought to preclude the introduction of evidence regarding differences in State Farm's contractual obligations to class members. In opposing these motions, State Farm argued, as it had in opposing class certification, that there were significant variances in its contractual obligations to the members of the class, and these variances resulted, at least in part, from differing insurance regulations in the various states. State Farm asserted:

"[N]othing is more basic in the trial of a contract claim than * * * that [] the rights and duties of the parties to a contract are defined by that specific contract. But plaintiffs ask to exclude that very starting point[,] [t]he contract of the individual class members, a contract which varies * * * depending on troublesome differences in State Farm's obligations toward members of the class. The contractual rights of the members of the class, Your Honor, do vary, and those variances are not only relevant but fundamental."

The circuit court granted several of plaintiffs' motions *in limine*, including those barring State Farm from (1) disclosing the states where the class members' policies were filed, (2) introducing evidence regarding variances in the states' insurance regulations, and (3) introducing

evidence regarding differences in State Farm's contractual obligations to members of the class.

The trial began on August 16, 1999. As previously indicated, the breach of contract claim was tried before the jury, and the remaining claims were tried before the court after the jury had left for the day. At the start of the trial, and over the objection of State Farm, the circuit court gave preliminary jury instructions. In these instructions, the court told the jury that State Farm's contractual obligation was "exactly the same, whether State Farm promised to pay for crash parts of like kind and quality or promised to pay for crash parts which restore a vehicle to its pre-loss condition." The court added that, under State Farm's policies, the company was allowed to specify either OEM parts or non-OEM parts, "so long as the crash parts are of like kind and quality which restore the damaged vehicle to its pre-loss condition." According to the circuit court, crash parts were of like kind and quality "only if they restore[d] a vehicle to its pre-loss condition," which the court defined as "the condition of the vehicle immediately prior to the time it is damaged."

It is unnecessary to recount in detail the evidence presented at trial. We note that the trial lasted several days, and involved hundreds of exhibits and testimony by dozens of witnesses. Much of the testimony dealt with whether non-OEM parts were categorically inferior to OEM parts. Each side presented the testimony of experts and bodyshop witnesses in support of their respective positions. At this point, we summarize only the testimony of the named plaintiffs, the testimony of plaintiffs' damages expert, and that of a State Farm claims consultant. Other facts relevant to our analysis will be introduced as they become pertinent.

Five named plaintiffs testified at trial. Michael Avery, of Louisiana, testified by video deposition. The remaining four gave their testimony in person: Mark Covington, a resident of Mississippi; Sam DeFrank, who lived in Illinois; Carly Vickers, a resident of Pennsylvania; and Todd Shadle, who was living in Massachusetts when his accident occurred.

Two of the witnesses, Avery and Shadle, did not have non-OEM parts installed on their vehicles. Both testified that before their respective accidents, their cars were in very good condition, and they would not consider non-OEM parts. Accordingly, both had OEM parts installed on their vehicles, rather than the non-OEM parts specified in the estimate, and both paid the difference in cost. For Shadle, the difference was about \$45, and for Avery it was about \$155.

Covington, DeFrank and Vickers did have non-OEM parts installed on their vehicles. All three expressed dissatisfaction with the parts. Vickers testified that, following the collision that gave rise to her suit, her car was involved in a subsequent, more serious accident and was declared a total loss. Vickers admitted that State Farm paid her "book value" for the car. She added that, so far as she knew, State Farm did not value her car any less because of the non-OEM parts that had been used in its repair. DeFrank testified that, several months after his truck was repaired, he sold the vehicle to his brother-in-law for an amount that was slightly below "Blue Book" value. However, DeFrank asserted that, even though the truck had been repaired with non-OEM parts, he did not discount the sale price based on this fact. DeFrank characterized the sale of the truck to his brother-in-law as an "arm's length transaction."

Plaintiffs' damages expert, Dr. Iqbal Mathur, testified that there were two types of damages being sought for breach of contract. The first was what Mathur termed "direct," or "specification," damages. According to Mathur, these damages were incurred when State Farm specified a non-OEM part on the repair estimate. Under this theory, everyone in the class was eligible to receive specification damages.

On cross-examination, Mathur acknowledged that a plaintiff would be entitled to receive specification damages even if his car were restored to its preloss condition. Mathur also conceded that specification damages would apply even if the car were repaired with an OEM part or with a non-OEM part that was of the same quality as an OEM part.

The second type of contract damages, which Mathur described as "consequential," or "installation," damages, was determined by calculating the cost of *replacing* non-OEM parts with OEM parts on a class member's vehicle. Only those class members who actually had non-OEM parts installed on their vehicles were eligible to receive installation damages.

On cross-examination, Mathur acknowledged that, with regard to installation damages, it was necessary to determine whether a non-OEM part was installed on a class member's vehicle. However, Mathur conceded that he had no way of making this determination. Mathur also acknowledged that he had "no opinion" as to how many class members had non-OEM parts installed on their vehicles but later received fair market value for them. Mathur admitted that his calculations as to installation damages might be incorrect by as much as \$1 billion.

Among the witnesses appearing for defendant was Don Porter, a State Farm property consultant in auto general claims. Porter's testimony was directed primarily to State Farm's "basic philosophy" of handling auto damage claims, rather than any specific contractual obligation. In describing this philosophy, Porter testified repeatedly that State Farm's goal was to pay to restore a policyholder's car to its preloss condition. According to Porter, State Farm has "always had a commitment to restoring the vehicle to its pre-loss condition." Porter also testified that the parts specified "must be as good as the part that was on the car prior to the loss." Porter never mentioned the Massachusetts or assigned risk policies, and never stated that all the State Farm policy forms at issue in this case were uniform.

Following the close of evidence, the circuit court, in conferring with the parties, reiterated the view that State Farm's contractual obligation was the same for each member of the class. In describing this uniform obligation, the circuit court pointed to Porter's testimony. According to the court, Porter testified that State Farm's promise "always was that when the car was repaired, the parts would be of like kind and quality which restores [the vehicle] to its pre-loss condition." The court ruled that this uniform interpretation of the contractual obligation would apply to all of State Farm's policies, including the "assigned risk" policies and the Massachusetts policies (neither of which contained the "like kind and quality" or the "pre-loss condition" language).

During the conference on jury instructions, State Farm objected to the use of the term "contract" in the

instructions.² State Farm argued: "Reference to a singular contract is factually inaccurate. There were numerous contracts." Counsel for State Farm informed the circuit court that, with regard to the court's interpretation of the contractual obligation as uniform, State Farm wanted to preserve its "objections as to variations in contract terms based on either differing policy language or differing state regulations." Counsel stated:

"We understand that's not going to be a part of this trial. So we merely want to preserve that for appellate purposes."

The circuit court noted the objection, and subsequently instructed the jury. The instructions regarding State Farm's contractual obligation essentially repeated what the court had given in its preliminary instructions. The essence of these contractual obligation instructions was that State Farm's contractual obligation was the same for every class member.

The verdict form given by the circuit court was general and classwide. It stated, in pertinent part: "Do you find that defendant State Farm failed to perform its obligations under the contract and breached its contract with the plaintiff class?" The circuit court denied State Farm's request to give, in addition, individual verdict forms for each named plaintiff.

² State Farm made essentially the same objection, in writing, in its "Memorandum Regarding Jury Instructions." Referring to plaintiffs' "substantive proposed contract instructions," State Farm noted that "[t]hese instructions speak of a single State Farm 'contract' with the 'class.'" State Farm argued, however, that "there is no one 'contract' with the class."

The jury found that "defendant State Farm failed to perform its obligations under the contract and breached its contract with the plaintiff class." Contract damages awarded to the plaintiff class totaled \$456,180,000, which consisted of \$243,740,000 in specification damages and \$212,440,000 in installation damages. The circuit court entered judgment on the jury's verdict in favor of plaintiffs on the contract claim. The court also entered judgment in plaintiffs' favor on the consumer fraud claim, finding that State Farm had, by its practices, violated the Consumer Fraud Act. The court awarded plaintiffs an additional \$130 million in "disgorgement" damages and \$600 million in punitive damages, resulting in a total award of \$1,186,180,000 on all claims.

On appeal, State Farm argued that, with regard to plaintiffs' breach of contract claim, individual questions predominated over any purported common questions, and the claim for breach of contract therefore should not have been certified as a class action. 735 ILCS 5/2-801(2) (West 1998). In its brief to the appellate court, State Farm contended that, contrary to the conclusion of the circuit court, the operative contractual language in State Farm's policies was *not* susceptible of uniform interpretation. While acknowledging that most of its auto insurance contracts contained the "like kind and quality" or the "pre-loss condition" language, State Farm insisted that "a significant number of policies did not." State Farm pointed, for example, to its policies in Massachusetts, as well as its assigned risk policies in Alaska, Illinois, Indiana, and Minnesota, which State Farm averred "did not use either the 'like kind and quality' or 'pre-loss condition' language." In its brief to the appellate court, State Farm asserted:

“Neither of these formulations [the Massachusetts policy provision or the ‘assigned risk’ policy provision] expressly imposes *any* standard of part quality. In fact, the assigned risk policies deliberately *delete* the ‘like kind and quality’ and ‘pre-loss condition’ language that appears in other State Farm policies.” (Emphases in original.)

Focusing on the circuit court’s interpretation of its contractual obligation as uniform, State Farm told the appellate court:

“Rather than trying to deal with the variations in policy language and the governing [state] laws, the circuit court chose to ignore them completely. The court instructed the jury that there was only one policy form, even though there are a number of different forms. Then the court made up its own interpretation of that policy form, without citing any law to support it. Finally, in order to enforce the artificial uniformity it had created, the court barred State Farm from telling the jury about any different contract language or differing state laws governing the specification of non-OEM parts.

The circuit court’s decision to force this case into the mold of a class action by fabricating a single contract and a single interpretation is an error of law of constitutional dimension that requires reversal by this Court.”

The appellate court affirmed the certification of plaintiffs’ breach of contract claim as a class action. The appellate court concluded, as had the circuit court, that State Farm’s contractual promise was the same for each member of the class. The appellate court stated:

"The record demonstrates that plaintiffs presented evidence to show that State Farm made the same promise (i.e., to pay for parts 'of like kind and quality' to restore 'pre-loss condition') to its policyholders throughout the country. State Farm's own witness, Don Porter, a claims consultant, acknowledged that State Farm had a uniform nationwide obligation to policyholders. This promise was to specify parts of like kind and quality to *OEM parts* so as to restore preloss condition." (Emphasis added.) 321 Ill.App.3d at 280.

The appellate court also affirmed the circuit court's finding that Illinois law could be applied to the contract claims of all the class members nationwide and that this imposition of Illinois law presented no constitutional difficulties.

With regard to the merits, the appellate court upheld the circuit court's judgment that State Farm breached its contractual obligation to the plaintiff class. The appellate court stated:

"Plaintiffs claimed that the non-OEM parts specified by State Farm were categorically inferior and failed to restore the vehicles to their 'pre-loss condition.' The claim was supported with expert testimony, from which it could be reasonably inferred, if accepted as true, that the lot of non-OEM parts specified by State Farm was inferior in terms of appearance, fit, quality, function, durability, and performance." 321 Ill.App.3d at 280.

The appellate court also upheld most of the damages awarded for breach of contract. In affirming the award of specification damages, the appellate court explicitly concluded that these damages applied even where (1) an

inferior non-OEM part was specified on the estimate, but the body shop provided an OEM part at no additional cost to the class member, and (2) non-OEM parts were used in the vehicle's repair, but the class member subsequently sold the vehicle for fair market value with no diminution in value because of the use of non-OEM parts. 321 Ill.App.3d at 287-88. The appellate court also upheld the award of installation damages, rejecting State Farm's criticism that these damages were speculative. 321 Ill.App.3d at 288-90.

However, the appellate court concluded that the \$130 million in disgorgement damages constituted an impermissible double recovery, and the appellate court therefore reversed this award. As a result, plaintiffs' total award was reduced to \$1,056,180,000.

State Farm appeals from those portions of the judgment of the appellate court affirming the judgment of the circuit court.³ We granted State Farm's petition for leave to appeal. 177 Ill.2d R. 315(a).

³ We granted leave to the following agencies and organizations to file *amicus curiae* briefs in support of State Farm: Alliance of American Insurers, Allstate Insurance Company, the Chamber of Commerce of the United States, Citizens for a Sound Economy Foundation, North Carolina Department of Insurance *et al.*, General Motors Corporation *et al.*, Government Employees Insurance Company *et al.*, Illinois Chamber of Commerce, Illinois Department of Insurance, Illinois Manufacturers' Association, National Association of Independent Insurers *et al.*, National Association of Insurance Commissioners, National Conference of Insurance Legislators *et al.*, the Superintendent of the Ohio Department of Insurance, Public Citizen, Inc., *et al.*, and Washington Legal Foundation. We also granted leave to the following agencies and organizations to file *amicus curiae* briefs in support of plaintiffs: Alliance of Automotive Service Providers National Association *et al.*,

(Continued on following page)

A. *Propriety of the Nationwide Contract Class*

Before this court, State Farm argues, as it did before the circuit and appellate courts, that the class should not have been certified. State Farm contends that individual questions predominate over any questions common to the class and that Illinois law should not have been applied to the contract claims of class members nationwide. With regard to the merits, State Farm argues that plaintiffs failed to establish a breach of State Farm's contractual obligation and plaintiffs failed to establish that they were entitled to damages. We turn first to State Farm's contention that the class should not have been certified.

Class certification is governed by section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 1998)), which is patterned after Rule 23 of the Federal Rules of Civil Procedure. See *Getto v. City of Chicago*, 86 Ill.2d 39, 47 (1981); K. Forde, *Illinois's New Class Action Statute*, 59 Chi. B. Rec. 120, 122-24 (1977). Given the relationship between these two provisions, federal decisions interpreting Rule 23 are persuasive authority with regard to questions of class certification in Illinois. See, e.g., *Schlessinger v. Olsen*, 86 Ill.2d 314, 320 (1981) (citing Fed.R.Civ.P. 23 case in analyzing class certification issue); see K. Forde, *Illinois's New Class Action Statute*, 59 Chi. B. Rec. 120, 122-24 (1977); *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000). Under section 2-801, a class may be certified only if the proponent establishes the four prerequisites set forth in the statute: (1) numerosity ("[t]he class is so numerous that joinder of all members is

Illinois Trial Lawyers Association, Trial Lawyers for Public Justice *et al.*, and United Policyholders. See 155 Ill.2d R. 345.

impracticable"); (2) commonality ("[t]here are questions of fact or law common to the class, which common questions predominate over any questions affecting only individual members"); (3) adequacy of representation ("[t]he representative parties will fairly and adequately protect the interest of the class"); and (4) appropriateness ("[t]he class action is an appropriate method for the fair and efficient adjudication of the controversy"). 735 ILCS 5/2-801 (West 1998).

Decisions regarding class certification are within the sound discretion of the trial court and should be overturned only where the court clearly abused its discretion or applied impermissible legal criteria. *McCabe v. Burgess*, 75 Ill.2d 457, 464 (1979); *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill.App.3d 995, 1001 (1991). However, "[a] trial court's discretion in deciding whether to certify a class action is not unlimited and is bounded by and must be exercised within the framework of the civil procedure rule governing class actions." 4 A. Conte & H. Newberg, *Newberg on Class Actions* § 13:62, at 475 (4th ed. 2002); see also *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir.1998) (noting that, while a trial court has broad discretion in deciding whether to certify a class, this discretion must be exercised within the framework of Fed.R.Civ.P. 23).

In the case at bar, State Farm argues that it was an abuse of discretion to certify the class. State Farm's argument focuses on the commonality and predominance requirement of section 2-801. According to State Farm, it was error for the lower courts to conclude that common questions predominated over questions affecting only individual class members.

With regard to the class that was certified for plaintiffs' contract claim, the common question identified by the circuit court in its certification order was whether State Farm's practice of specifying non-OEM parts on repair estimates constituted a breach of State Farm's contractual obligations. According to the circuit court, this question of "contractual interpretation" predominated over other issues. In reaching this conclusion, the circuit court acknowledged State Farm's argument that its insurance contracts took varying forms and there was thus no standard form contract to be interpreted. However, in the court's view, the specific form of the individual insurance policies was immaterial so long as "the operative contractual language contained in each policy [was] susceptible [of] uniform interpretation." The court concluded that this question of whether the various policies' language could be given uniform interpretation should be decided at trial, rather than at the class certification stage.

Notwithstanding this assertion by the court, the issue of uniform contractual interpretation was never decided on the merits. As previously noted, prior to trial the circuit court granted plaintiffs' motions *in limine* barring the introduction of evidence regarding differences in State Farm's contractual obligations and prohibiting any mention of the states where the class members' policies were filed. As a result of these rulings, the jury was prevented from hearing evidence regarding any variations in State Farm's contractual obligations to the class members. Moreover, by the time the trial began, the circuit court itself had decided the issue of whether the contractual language in State Farm's various policies was susceptible of uniform interpretation. In its preliminary instructions to the jury, the court stated: "The contractual obligation of

State Farm under its policies or insurance contracts is *exactly the same*, whether State Farm promised to pay for crash parts of like kind and quality or promised to pay for crash parts which restore a vehicle to its pre-loss condition." (Emphasis added.) Following the close of evidence in the jury trial, the circuit court expressed this uniform contractual interpretation in even broader terms, ruling that it applied to all of State Farm's policies, including the assigned risk policies and the Massachusetts policies (neither of which contained the "like kind and quality" or the "pre-loss condition" language).

In our view, the circuit court was incorrect in concluding, in the first instance, that the question of uniform contractual interpretation should be decided at trial rather than at the class certification stage. Apparently the circuit court came to this realization as well (although belatedly), as is evinced by the court's deciding the uniform interpretation issue prior to trial. The reason why this question should have been resolved during the certification stage is that, had the court answered the question in the negative rather than the affirmative, the class could not have been certified. In order to satisfy the second requirement of section 2-801 (a common question of fact or law predominates over other questions affecting only individual class members), it must be shown that "successful adjudication of the purported class representatives' individual claims will establish a right of recovery in other class members." *Goetz v. Village of Hoffman Estates*, 62 Ill.App.3d 233, 236 (1978); accord *Society of St. Francis v. Dulman*, 98 Ill.App.3d 16, 18 (1981); *Hagerty v. General Motors Corp.*, 59 Ill.2d 52, 59 (1974); see also *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (7th Cir.1997) (noting that the typicality and commonality requirements of Fed.R.Civ.P.

23 “ensure that only those plaintiffs or defendants who can advance the same factual and legal arguments may be grouped together as a class”). In the case at bar, if the circuit court had concluded that the operative contractual language in State Farm’s various policies was *not* susceptible of uniform interpretation, this would have raised the possibility that there was a breach of contract with some class members but not with others. See *Broussard*, 155 F.3d at 340. In such a situation, the successful adjudication of the claims of some class members would not necessarily establish a right to recovery in others. If there were significant differences in the operative contractual language of the various policies, the commonality and predominance requirement of section 2-801 could not be met, and the class could not be certified. Accordingly, the circuit court erred in declining to decide the question of uniform contractual interpretation at the class certification stage. As noted, the circuit court apparently realized this error and decided the uniform interpretation issue prior to trial.

The question before us is whether the circuit court decided this issue correctly. In other words, was it error for the circuit court to conclude that the operative language in State Farm’s various policies could be given a uniform interpretation such that the successful adjudication of the contract claims of some class members would establish a right to recovery in other class members? The determination of this issue requires an examination of the relevant contracts. The starting point of any contract analysis is the language of the contract itself. *Church v. General Motors Corp.*, 74 F.3d 795, 799 (7th Cir.1996); *Dugan v. Smerwick Sewerage Co.*, 142 F.3d 398, 403 (7th Cir.1998). As a general rule, the construction, interpretation, or legal effect of a contract is a matter to be determined by the

court as a question of law. 12A Ill. L. & Prac. *Contracts* § 264, at 107 (1983); see *Chicago Daily News, Inc. v. Kohler*, 360 Ill. 351, 363 (1935); *Sindelar v. Liberty Mutual Insurance Co.*, 161 F.2d 712, 713 (7th Cir.1947). Our review of this issue is therefore *de novo*. See *Hessler v. Crystal Lake Chrysler-Plymouth, Inc.*, 338 Ill.App.3d 1010, 1017 (2003).

We begin with the two main policy forms at issue in this case. The first includes the “like kind and quality” language and provides, in pertinent part:

“We have the right to settle a *loss* with *you* or the owner of the property in one of the following ways:

* * *

2. pay to repair or replace the property or part with like kind and quality. If the repair or replacement results in better than like kind and quality, *you* must pay for the amount of the betterment * * *” (Emphases in original.)

The second policy form contains the “pre-loss condition” provision, as well as language expressly providing that State Farm’s contractual obligation could be met by specifying non-OEM parts. This policy form states, in pertinent part:

“The cost of repair or replacement is based upon one of the following:

* * *

3. an estimate written based upon the prevailing competitive price. * * * We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. *You* agree with us that

such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers." (Emphasis in original.)

In our view, these two policy forms are *not* the same. As noted, the second one contains, in addition to the "pre-loss condition" promise, an explicit agreement between State Farm and the policyholder regarding the use of non-OEM parts: "You agree with us that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers." (Emphasis in original.) In its brief to this court, State Farm points in particular to this language, explaining that it "expressly provided that State Farm could meet [the preloss condition] obligation by specifying non-OEM parts." In contrast, the first policy form set forth above, which contains the "like kind and quality" promise, makes no mention of OEM or non-OEM parts, nor does it expressly allow for the specification of non-OEM parts. If, as plaintiffs claim, the specification of non-OEM parts constitutes a breach of State Farm's contractual obligation, plaintiffs who were insured under policies containing the "like kind and quality" promise would be in a different position regarding this non-OEM-parts claim than would plaintiffs with policies containing the "you agree" language. Class members with a "like kind and quality" policy would have a stronger case for breach of contract than would those whose policies expressly *allowed* the practice that is alleged to constitute the breach. It follows that the successful adjudication of the claims of class members with the "like kind and quality" language would not necessarily establish a right of recovery in those with the "you agree" language. See *Hagerty*, 59 Ill.2d at 59; *Goetz*, 62 Ill.App.3d at 236; *Dulman*, 98

Ill.App.3d at 18; *Mace*, 109 F.3d at 341. There is thus a material difference between the policies containing the “you agree” provision and those that do not contain this language.⁴

This difference between the “like kind and quality” policies, on the one hand, and the “pre-loss condition” policies containing the “you agree” provision, on the other, is not the only instance in this case of material differences in policy language. The putative class also includes State Farm insureds with policies that contain *neither* the “like kind and quality” *nor* the “pre-loss condition” promise. State Farm’s Massachusetts policies, for example, simply promise to pay “the actual cash value” of “parts at the time of the collision.” The same is true of most of State Farm’s “assigned risk” policies, which are used in the “residual market” of high-risk consumers that insurers are required to cover. Just as with the Massachusetts policies, the majority of the “assigned risk” policies contain neither the “like kind and quality” nor the “pre-loss condition” language. Instead, the “assigned risk” policies promise to pay an “[a]mount necessary to repair or replace the property.”

As State Farm points out, neither of these formulations – the Massachusetts policy provision or the “assigned risk” policy provision – expressly imposes *any* standard of part quality. It follows that plaintiff class members who were insured under either of these policies would be in a different position than their “like kind and quality” and “pre-loss condition” counterparts regarding the claim that the specification of non-OEM parts constituted a breach of

⁴ Plaintiffs make no mention of the “you agree” language in their brief to this court.

their insurance contract. The successful adjudication of the claim of a "like kind and quality" policyholder, for example, would not necessarily establish a right to recovery in a class member with either a Massachusetts or an "assigned risk" policy. See *Goetz*, 62 Ill.App.3d at 236; *Dulman*, 98 Ill.App.3d at 18.

Notwithstanding the foregoing, the circuit court, following the close of evidence in the jury trial, reiterated its pretrial conclusion that State Farm's contractual obligation was the same for each member of the class. The circuit court determined that all of State Farm's policies, including the Massachusetts policies and the "assigned risk" policies, conveyed the same contractual promise. The court stated:

"After having heard all the testimony, and I wrote down in particular when it was done, Mr. Porter's testimony that State Farm's agreement, promise, however you choose to characterize it, always was that when the car was repaired, the parts would be of like kind and quality which restores [it] to its pre-loss condition."

The appellate court also referred specifically to Porter's testimony in concluding that State Farm's contractual obligation was uniform: "State Farm's own witness, Don Porter, a claims consultant, acknowledged that State Farm had a uniform nationwide obligation to policyholders." 321 Ill.App.3d at 280. Plaintiffs take this same position, pointing to Porter's testimony and contending that State Farm's contractual obligations to its policyholders were uniform. We disagree.

First, Porter's testimony about State Farm's "commitment to restoring the vehicle to its pre-loss condition"

referred to a "basic philosophy" goal of the company, rather than a contractual obligation. Porter never testified that all of the policy forms at issue in this case were uniform. Second, to the extent that his testimony could be read as referring to State Farm's insurance contracts, the most that can be said about this testimony is that Porter was referring to individual policy *terms* rather than all of the relevant policy *forms*. Viewed in the light most favorable to plaintiffs, Porter's testimony may be read as supporting the position that the "like kind and quality" and the "pre-loss condition" phrases mean the same thing: State Farm promised to pay to restore the policyholder's vehicle to its preloss condition using parts as good as the parts that were on the vehicle at the time of the loss. However, there is nothing to indicate that Porter's testimony encompasses any other policy language.

An example of a policy provision that falls *outside* the scope of Porter's testimony is the "you agree" language, which expressly allows for the specification of non-OEM parts. While Porter made brief mention of the "you agree" language in his testimony, he discussed this language only as an example of the notice that State Farm provided to policyholders regarding its non-OEM-parts practices. Porter did *not* state in his testimony that a policy containing language that expressly allows for the specification of non-OEM parts is the contractual equivalent of a policy that *omits* this language. His testimony simply contains *no comment* with regard to this matter. Accordingly, with respect to State Farm's allegedly uniform contractual obligation, Porter's testimony supports *only* the view that the "like kind and quality" phrase and the "pre-loss condition" phrase mean the same thing: that State Farm's obligation was to pay to restore the policyholder's vehicle

to its preloss condition. Porter's testimony does *not* support the position of the lower courts, and of plaintiffs, that the presence of the "you agree" language makes no difference and that policies containing this language convey the same contractual promise as do policies that omit it.

Equally important, Porter's testimony does not encompass State Farm's Massachusetts policies or its "assigned risk" policies, neither of which contain the "like kind and quality" or the "pre-loss condition" language. We have carefully examined the more than 200 transcript pages of Porter's testimony. We find no mention of either the Massachusetts policies or the "assigned risk" policies. The assertion that Porter's "uniform obligation" testimony encompasses these policies is simply not supported by the evidence. Accordingly, Porter's testimony does *not* support the position of the lower courts, and of plaintiffs, that State Farm policies which *omit* the "like kind and quality" and the "pre-loss condition" language state the same contractual promise as policies that include this language.

Moreover, there is no other record evidence that can sustain the conclusion that material policy differences – *i.e.*, the "you agree" language and the "assigned risk" language – make *no* difference, and that all of State Farm's various policy formulations are the same. Plaintiffs do point to evidence in addition to Porter's testimony, but this other evidence consists essentially of statements that are equivalent to Porter's assertions or reflect them. There is nothing to support the conclusion that the "you agree" language, for example, or the Massachusetts or "assigned risk" policies are irrelevant and that all of State Farm's policy variations therefore are susceptible of the same contractual interpretation. Indeed, State Farm has argued

from the beginning of this case that such variances *are* relevant and that they preclude class certification.

In sum, there is simply no evidentiary support for the lower courts' conclusion that *all* of State Farm's various policies are uniform. Where a putative class includes members who are insured under policies that are materially different, the commonality and predominance requirement of section 2-801 cannot be met. 735 ILCS 5/2-801(2) (West 1998). See *Hagerty*, 59 Ill.2d at 59; *Goetz*, 62 Ill.App.3d at 236; *Dulman*, 98 Ill.App.3d at 18; *Mace*, 109 F.3d at 341. Accordingly, it was an abuse of discretion for the circuit court to certify plaintiffs' breach of contract claim as a class action. See *Broussard*, 155 F.3d at 340 ("[P]laintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts"). We therefore reverse the certification of the nationwide contract class.

B. *Whether the Verdict May Be Affirmed With Respect to Subclasses*

Having determined that the certification of the nationwide contract class should be reversed, we note that there remains a question whether the jury's breach of contract verdict may be affirmed with regard to any subclass comprised of policyholders who were insured under any of the relevant individual policy forms. For the reasons set forth below, we answer this question in the negative.

We note initially that there are serious questions as to whether the breach of contract verdict may be upheld for *any* group of class members. Under the verdict form given by the circuit court, the jury found that "defendant State

Farm failed to perform its obligations under *the contract* and breached *its contract* with the plaintiff class." (Emphases added.) This verdict form followed naturally from the jury instructions, which stated that there was a single contract at issue with a uniform contractual obligation.

However, we have concluded, as a matter of law, that this was error. There was no single contract. Rather, there were multiple policy forms which differed materially. On its face, therefore, the verdict is improper. It included no finding, for example, that State Farm breached the policy form containing the "you agree" language, which *allowed* the practice that plaintiffs claim constituted the breach. Indeed, there could not have been such a finding. The jury was never instructed as to the "you agree" provision. Nor was there any finding in the verdict that State Farm breached its contractual obligation in the Massachusetts policies or the "assigned risk" policies. Once again, the jury was not instructed as to these policies. The verdict simply stated, incorrectly, that State Farm breached a *single contract* with the plaintiff class.

Accordingly, the breach of contract verdict cannot be upheld with respect to any subclass of policyholders insured under any of the individual policy forms at issue. However, we do not decide this case on this ground alone. Instead, we also look at the individual relevant policy forms and consider whether plaintiffs established a breach of any of them. We also consider whether plaintiffs established damages. For the reasons set forth below, we answer these questions in the negative.

1. The Massachusetts and "Assigned Risk" Policies

With regard to the Massachusetts policies and the "assigned risk" policies, we conclude that there was no breach. Neither of these policy forms contained the "like kind and quality" or the "pre-loss condition" language. The Massachusetts policies promised to pay "the actual cash value" of "parts at the time of the collision," and the "assigned risk" policies promised to pay an "[a]mount necessary to repair or replace the property." As State Farm has noted, neither of these formulations – the Massachusetts policy provision or the "assigned risk" policy provision – expressly imposed any standard of part quality. The specification of non-OEM parts would not constitute a breach of these contracts. So long as, with regard to the Massachusetts policies, State Farm paid "the actual cash value" of "parts at the time of the collision," and so long as, with regard to the "assigned risk" policies, State Farm paid an "[a]mount necessary to repair or replace the property," the contractual obligation would be met. It would not matter whether the parts specified were non-OEM, OEM, or some other type. Thus, the jury's breach of contract verdict may not be affirmed with respect to a subclass consisting of policyholders insured under these provisions.

2. The "You Agree" Policies

We turn next to the policies containing the "pre-loss condition" and the "you agree" language. As noted, these provisions state:

"The cost of repair or replacement is based upon one of the following:

* * *

3. an estimate written based upon the prevailing competitive price. * * * We will include in the estimate parts sufficient to restore the vehicle to its pre-loss condition. *You agree with us that such parts may include either parts furnished by the vehicle's manufacturer or parts from other sources including non-original equipment manufacturers.* (Emphasis in original.)

We cannot affirm the jury's verdict with respect to a subclass of policyholders who were insured under these provisions. First, pursuant to the "you agree" language, the insured expressly agrees that "such parts," *i.e.*, parts sufficient to restore a vehicle to its preloss condition, "may include * * * parts from * * * non-original equipment manufacturers." In other words, the insured agrees that the "pre-loss condition" promise may be met by specifying non-OEM parts. In their brief to this court, plaintiffs do not explain, in any way, how a contract containing the "you agree" language, which *expressly permits* the specification of non-OEM parts, may be breached by *the specification of non-OEM parts*. Plaintiffs have established, in support of their claim, that non-OEM parts were specified by State Farm in class members' estimates. However, in view of the "you agree" language, this specification of non-OEM parts, by itself, cannot constitute a breach of the "pre-loss condition" promise.

Second, in order to establish a breach of the "pre-loss condition" promise, plaintiffs would have to show that the parts specified or used by State Farm, whether OEM or non-OEM parts, did not restore the vehicle to its preloss condition. A necessary first step in making this showing would be to examine each class member's vehicle to

determine its preloss condition. At trial, Timothy Ryles and Paul Griglio, two of plaintiffs' expert witnesses, conceded the necessity for such a determination. The following colloquy took place between State Farm's counsel and Ryles:

"Q. Good point, Dr. Ryles. To determine whether a particular car has been restored to its pre-loss condition, you'd have to know what the pre-loss condition of that car was; isn't that right?

A. You need to, yes."

Griglio made a similar concession in this exchange with State Farm's counsel:

"Q. Similarly, sir, to know whether or not a car was restored to pre-loss condition, you would need to know what the pre-loss condition of that car was, wouldn't you?

A. Yes, you would."

In the case at bar, the determination of the preloss condition of each subclass member's vehicle would require the individual examination of hundreds of thousands, if not millions, of vehicles. Undoubtedly, these examinations would overwhelm any question common to the subclass, rendering it impossible for such questions to predominate. As noted, class certification is improper unless "common questions predominate over any questions affecting only individual members." 735 ILCS 5/2-801(2) (West 1998). For this reason, a claim for breach of the preloss condition promise cannot be maintained as a class action. See *Augustus v. Progressive Corp.*, 2003-Ohio-296, ¶ 25; *Schwendeman v. USAA Casualty Insurance Co.*, 116 Wash.App. 9, 22-23, 65 P.3d 1, 8 (2003); *Snell v. Geico Corp.*, No. Civ.

202160, slip op. at 6 (Md.Cir.Ct. August 14, 2001). Accordingly, the jury's breach of contract verdict may not be affirmed for a subclass comprised of policyholders insured under the preloss condition provision.

3. The "Like Kind and Quality" Policies

The remaining policy form is the one containing the "like kind and quality" promise. Before analyzing this provision, we note that the record appears to include the policies of only two of the named plaintiffs, DeFrank and Covington. Both DeFrank's and Covington's policies contain the "pre-loss condition" and "you agree" language. In addition, although we were unable to find a copy of Avery's policy in the record, testimonial evidence indicates that Avery's policy also contained the "pre-loss condition" and "you agree" language.

With regard to the remaining two named plaintiffs – Shadle and Vickers – the record does not appear to include their policies. On this record, therefore, it is unclear that the contracts of *any* of the named plaintiffs contained the "like kind and quality" language. If none of the named plaintiffs' policies contained the "like kind and quality" language, State Farm could not have breached this provision in any of the named plaintiffs' policies. Accordingly, plaintiffs' claim for breach of the "like kind and quality" promise fails for lack of proof. We cannot uphold a subclass based on this policy form. "It is well settled that a class cannot be certified unless the named plaintiffs have a cause of action." *Spring Mill Townhomes Ass'n v. OSLA Financial Services, Inc.*, 124 Ill.App.3d 774, 779 (1983), citing *Landesman v. General Motors Corp.*, 72 Ill.2d 44 (1978); accord, e.g., *Perlman v. Time, Inc.*, 133 Ill.App.3d

348, 354 (1985). Assuming, *arguendo*, that there *were* named plaintiffs with this policy form, we conclude that there was no breach of the "like kind and quality" promise.

The "like kind and quality" promise states:

"We have the right to settle a *loss* with *you* or the owner of the property in one of the following ways:

* * *

2. pay to repair or replace the property or part with like kind and quality. If the repair or replacement results in better than like kind and quality, *you* must pay for the amount of the betterment * * * " (Emphases in original.)

According to the appellate court (and plaintiffs), "like kind and quality," as stated in this promise, meant "like kind and quality to OEM parts." 321 Ill.App.3d at 280. Plaintiffs' contention throughout this case has been that the non-OEM parts that were at issue were categorically inferior to their OEM counterparts. It follows that, under this theory, State Farm's specification of non-OEM parts could *never* satisfy the obligation to pay for parts of "like kind and quality." In their third amended complaint, plaintiffs alleged: "As a practical matter, [State Farm's] obligation could be met *only* by requiring the *exclusive use* in repairs of *factory-authorized or OEM parts*." (Emphases added.)

In our view, there are several difficulties with this theory that the "like kind and quality" promise is necessarily breached by the specification of non-OEM parts. First, the ~~language~~ language of the promise itself contradicts the view that State Farm may meet its contractual obligation

only by specifying *OEM* parts. If the purpose of State Farm's promise "to repair or replace the property or part with *like kind and quality*" (emphasis added) were to require the specification of *OEM* parts, then there is no reason why the indirect phrasing "*like kind and quality*" would have been used. The provision could simply have promised that *OEM* parts would be specified. Implicit in the phrase "*like kind and quality*" is the likeness or similarity of *one thing to another*. Common sense indicates that an item that is of "*like kind and quality*" to another is not that very item, but rather is something of "*like kind and quality*" to it.

Also contradicting the position that "*like kind and quality*" means *OEM* parts is the contract language accompanying the "*like kind and quality*" promise. In the "*like kind and quality*" provision as set forth above, the sentence immediately following the "*like kind and quality*" promise states: "If the repair or replacement results in *better than like kind and quality* [emphasis added], you must pay for the amount of the betterment [emphasis in original] * * *." This policy language, which requires an insured to pay for "repair or replacement [which] results in *better than like kind and quality*" (emphasis added), presumes a standard of quality that is "*better than like kind and quality*." However, under plaintiffs' reasoning, there is nothing better than "*like kind and quality*."

Recall the position taken by plaintiffs. According to plaintiffs, *all* the non-*OEM* parts at issue in this case are categorically inferior to *OEM* parts. This means, of necessity, that *OEM* parts represent the highest possible standard of quality. In addition, according to plaintiffs, because non-*OEM* parts are categorically inferior to *OEM* parts, the "*like kind and quality*" promise can only be met by

specifying OEM parts. Thus, because OEM parts are the best possible parts, and because the “like kind and quality” promise means OEM parts, plaintiffs also necessarily take the position that the term “like kind and quality” refers to the highest possible standard of quality.

But this reasoning cannot be correct. State Farm’s policy cannot be referring to OEM parts when it uses the term “like kind and quality” because the policy itself says that there is a standard of quality which is *better* than “like kind and quality” parts. Plaintiffs are clearly incorrect in equating “like kind and quality” with OEM parts.

As previously indicated, State Farm defines “like kind and quality” differently from plaintiffs (and the appellate court). In State Farm’s view, “like kind and quality” means “sufficient to restore a vehicle to its pre-loss condition.”⁶

There is substantial legal support for State Farm’s view.

Courts in other jurisdictions have adopted a similar interpretation of the term “like kind and quality.” In *Siegle*

⁶ Plaintiffs point to a 1986 version of an internal State Farm document, General Claims Memo # 430 (GCM # 430), which, according to plaintiffs, contradicts State Farm’s position that “like kind and quality” means “sufficient to restore a vehicle to its pre-loss condition.” However, as State Farm claims consultant Don Porter stated at trial, GCM # 430 is not contained within the four corners of any State Farm insurance contract. GCM # 430 is therefore extrinsic evidence as to the meaning of the “like kind and quality” contractual promise. Absent a finding that the “like kind and quality” promise is ambiguous, such extrinsic evidence is irrelevant to the meaning of this contractual provision. See *Grzeszczak v. Illinois Farmers Insurance Co.*, 168 Ill.2d 216, 223-24, 213 Ill.Dec. 606, 659 N.E.2d 952 (1995); *Dempsey v. National Life & Accident Insurance Co.*, 404 Ill. 423, 426, 88 N.E.2d 874 (1949). We make no such finding of ambiguity.

v. Progressive Consumers Insurance Co., 819 So.2d 732 (Fla.2002), the issue was whether, under “like kind and quality” policy language similar to that in the case at bar, an insurer was obligated not only to complete “a first-rate repair which returns the vehicle to its pre-accident level of performance, appearance, and function,” but also to compensate the insured in money for any diminution in market value that resulted from the repaired vehicle’s status as a wrecked car. *Siegle*, 819 So.2d at 733. The court ruled that there was no such dual obligation on the part of the insurer. The court explained that, under the policy language at issue, the insurer had a choice of either reimbursing the insured through a money payment or paying to repair or replace the automobile with other property of like kind and quality. If, as in the case that was before the court, the repair option was chosen, “the insurer’s liability was limited to the monetary amount necessary to repair the car’s function and appearance, *commensurate with the condition of the auto prior to the loss.*” (Emphasis added.) *Siegle*, 819 So.2d at 739. Thus, in the court’s view, a promise to repair damaged property with *like kind and quality* meant that the insurer was obligated to restore the vehicle to its *preloss condition*. See also *Ray v. Farmers Insurance Exchange*, 200 Cal.App.3d 1411, 1418, 246 Cal.Rptr. 593, 596 (1988) (“To the extent [that plaintiff’s] automobile was repaired to its *pre-accident* safe, mechanical, and cosmetic condition, [defendant’s] obligation under the policy of insurance to repair to ‘like kind and quality’ was discharged” (emphasis added)); *Berry v. State Farm Mutual Automobile Insurance Co.*, 9 S.W.3d 884, 894-95 (Tex.Ct.App.2000) (under court’s interpretation of the Texas Insurance Code, whether a part is of “like kind and quality” depends on “the age or condition of the covered vehicle prior to the accident”);

Schwendeman v. USAA Casualty Insurance Co., 116 Wash.App. 9, 22-23, 65 P.3d 1, 8 (2003) (under the insurance policy at issue, “whether a replacement part is of ‘like kind and quality’ to the part it replaces necessarily requires ascertaining the condition of the vehicle before the accident in terms of its age, mileage, and physical condition, and the quality of the replacement part”); *Snell v. Geico Corp.*, No. Civ. 202160, slip op. at 6 (Md.Cir.Ct. August 14, 2001) (preloss condition of each individual vehicle must be established in order to determine whether insurer’s “like kind and quality” promise was breached).

State Farm maintains that “pre-loss condition” is what defines “like kind and quality,” rather than the other way around. For State Farm it is irrelevant whether non-OEM parts are of like kind and quality to OEM parts. The determinative issue is whether the parts specified are sufficient to restore the vehicle to its preloss condition, *i.e.*, the condition of the vehicle shortly before the accident. Under this definition of “like kind and quality,” the specification of non-OEM parts would not necessarily breach the “like kind and quality” promise.

We agree with State Farm. The term “like kind and quality,” as used in the relevant policies, meant “sufficient to restore a vehicle to its pre-loss condition.” We therefore conclude that the specification of non-OEM parts would not necessarily constitute a breach of the “like kind and quality” promise. Thus, we cannot affirm the jury’s breach of contract verdict with respect to a subclass consisting of policyholders insured under this provision.

In sum, the jury’s breach of contract verdict may not be upheld for any subclass comprised of policyholders insured under any of the individual relevant policy forms.

State Farm's specification of non-OEM parts did not constitute a breach of the Massachusetts policies or the "assigned risk" policies, neither of which expressly imposed any standard of part quality. Nor did the specification of non-OEM parts constitute a breach of the policies containing the "pre-loss condition" and the "you agree" provisions. Under the "you agree" language, the insured *agrees* that the "pre-loss condition" promise may be met by specifying non-OEM parts. Further, the individualized proof needed to establish a breach of the "pre-loss condition" promise would destroy the commonality required of a class action. Finally, plaintiffs' claim for breach of the "like kind and quality" promise fails for a number of reasons. First, the claim fails for lack of proof. In addition, State Farm's specification of non-OEM parts did not constitute a breach of the policies containing the "like kind and quality" provision. The term "like kind and quality," as used in the relevant policies, meant "sufficient to restore a vehicle to its pre-loss condition." This obligation, which is satisfied so long as the parts are sufficient to restore the vehicle to its preaccident condition, is not necessarily breached by the specification of non-OEM parts. Moreover, as noted above, the individualized proof required to establish a breach of the "pre-loss condition" promise would overwhelm any questions common to the subclass, thus prohibiting certification of the claim as a class action.

4. Damages

There is an additional reason why the breach of contract verdict may not be upheld with regard to any subclass. Plaintiffs have failed to establish damages.

a. *Specification Damages*

Two types of damages were awarded to the plaintiff class for breach of contract: (1) direct, or “specification,” damages, and (2) consequential, or “installation,” damages. The first type of damages, which is based on plaintiffs’ theory that the contract was breached by the *specification* of non-OEM parts, was calculated as the cost difference between the OEM parts that plaintiffs claimed *should* have been specified and the non-OEM parts that State Farm listed on the repair estimate. According to plaintiffs, this figure constituted the amount that State Farm “saved by specifying cheaper [non-OEM] parts.” Plaintiffs’ damages expert, Dr. Iqbal Mathur, calculated that specification damages for the class as a whole would total \$243,700,000. Under plaintiffs’ theory, everyone in the class was eligible to receive specification damages.

In our view, plaintiffs’ theory of “specification damages” has no basis in the law. Under this theory, loss occurs when a non-OEM part is *specified* on the estimate rather than when the part is *installed* on the vehicle. Plaintiffs’ damages expert, Dr. Mathur, conceded at trial that specification damages apply to any class member whose repair estimate *specified* a non-OEM part, regardless of whether a non-OEM part was used in the repair of the vehicle. Thus, a policyholder who had been quoted a non-OEM part on his estimate could receive specification damages even if (1) his vehicle was repaired with an OEM part, or (2) his car was restored to its preloss condition. By this same reasoning, specification damages would apply where a non-OEM part was specified on the estimate and was used in the repair, but the policyholder subsequently sold his vehicle for fair market value. If it is the simple *specification* of the non-OEM part in a repair estimate

that inflicts the damage, it is irrelevant, under plaintiffs' theory, what happens afterwards, even if the policyholder ultimately suffers no actual damage.

It should be noted that, given this focus on the *specification*, rather than the *installation*, of non-OEM parts, plaintiffs' specification-damages theory stands in contrast to their third amended complaint, as well as to the definition of the plaintiff class as certified by the circuit court. In their third amended complaint, plaintiffs describe State Farm's alleged breach of contract in terms of State Farm's use of non-OEM parts in *repairs* that result, *inter alia*, in plaintiffs' *receipt* of such parts:

"Defendant State Farm's common practice of *using* inferior, imitation parts in *repairs* constitutes a breach of its obligation to all insureds who either *received* such parts or were obligated to pay the difference in price between imitation parts and the OEM parts actually *installed*." (Emphases added.)

Similarly, the circuit court, in defining the plaintiff class, refers to plaintiffs who had non-OEM parts *installed* on their vehicles. In the judgment in favor of plaintiffs on their breach of contract claim, the plaintiff class was defined, in pertinent part, as:

"All persons in the United States, except those residing in Arkansas and Tennessee, who, between July 28, 1987, and February 24, 1998, (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory authorized and/or non-OEM (Original Equipment Manufacturer) 'crash parts' *installed* on their vehicles or else received

monetary compensation determined in relation to the cost of such parts." (Emphasis added.)

Given the contrast between the focus of the specification-damages theory on the estimate's *listing* of non-OEM parts, on the one hand, and the references in the complaint and the class definition to the *use* or *installation* of non-OEM parts, on the other, a question arises as to why plaintiffs devised their specification-damages theory in the first instance. The answer lies in plaintiffs' belated realization that they would be unable to establish damages and still maintain the commonality required of a class action. If, in keeping with the complaint and the class definition, loss did not occur until non-OEM parts were *installed*, plaintiffs would need to show which class members' vehicles had actually been repaired with non-OEM parts, as well as which class members still owned vehicles that had been repaired with non-OEM parts. However, State Farm's records did not contain this information.⁶ Accordingly, any determinations as to which plaintiffs were eligible for damages would require the examination of each individual class member's vehicle and repair. Such an undertaking, however, would mean that questions affecting individual class members would predominate over common questions, destroying the commonality required

⁶ In affirming the certification of the nationwide class, the appellate court stated: "[T]hrough its own records State Farm is capable of identifying class members who have had non-OEM parts installed on their vehicles." 321 Ill.App.3d at 283, 254 Ill.Dec. 194, 746 N.E.2d 1242. However, in its brief to the appellate court, State Farm flatly contradicted this assertion: "State Farm's records do not show which class members' vehicles had actually been repaired with non-OEM parts, let alone which class members still owned such vehicles." The appellate court never explained the discrepancy between its statement and State Farm's.

for a class action. See 735 ILCS 5/2-801(2) (West 1998); *Magro v. Continental Toyota, Inc.*, 67 Ill.2d 157, 161 (1977).

Faced with this dilemma, plaintiffs created their specification-damages theory, under which the alleged breach of contract and the resulting damages occurred when non-OEM parts were *specified* in repair estimates, rather than when the non-OEM parts were *installed*. If damage occurred when non-OEM parts were *specified*, there would be no need for individual inquiry as to whether such parts were actually used in the repair of a particular vehicle, or whether the claimant still owned the vehicle in question. Under plaintiffs' specification-damages theory, the damage occurred when the non-OEM part was *listed* on the estimate, and it did not matter whether the part was actually used in the repair or whether the policyholder still owned the vehicle.

While plaintiffs' specification damages theory appeared to preserve the commonality necessary for a class action, it achieved this goal at the expense of denoting real damages. Common sense dictates that any injury resulting from non-OEM parts would be inflicted, not by the mere *specification* of such parts in an estimate, but by the *use* of the parts in the repair of a vehicle. No possible damage could come to a policyholder simply because a non-OEM part was listed on his repair estimate. Only if the part were actually installed, and only if it were shown that this part failed to restore the vehicle to its preloss condition, could it possibly be said that the policyholder suffered damage.

Indeed, plaintiffs' own damages expert, Dr. Mathur, acknowledged at trial that plaintiffs' theory of specification

damages made no economic sense. During cross-examination, the following colloquy took place between State Farm's counsel and Dr. Mathur:

"Q. So, from an economic perspective, which is all that you are qualified to testify about, you would have to tell us that your theory of direct damages doesn't make economic sense; isn't that true, sir?

A. That is correct.

Q. Thank you. So, according to you, as an economist, and not as a lawyer, using theories that plaintiffs' lawyers have tried to give you, is a policyholder *entitled* to damages merely because State Farm quoted a non-OEM part on their estimate, as long as State Farm did restore the car to its pre-loss condition?

A. No." (Emphasis added.)

We agree with plaintiffs' damages expert that plaintiffs' theory of specification damages makes no sense. In our view, plaintiffs' notion of specification damages contravenes the basic theory of damages for breach of contract, under which the claimant must establish an actual loss or measurable damages resulting from the breach in order to recover. See, e.g., *Economy Fire & Casualty Co. v. GAB Business Services, Inc.*, 155 Ill.App.3d 197, 201 (1987). We reject, as a matter of law, plaintiffs' theory of specification damages.

b. *Installation Damages*

The second type of contract damages awarded was installation damages. Unlike "specification" damages, "installation" damages were derived from a theory based

on an actual loss. However, as explained below, the evidence offered in support of plaintiffs' installation damages was so speculative and uncertain that awarding damages based on this evidence constituted an arbitrary deprivation of property in violation of State Farm's due process rights. See *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 416 155 L.Ed.2d 585, 600, 123 S.Ct. 1513, 1519-20 (2003) (due process clause of the fourteenth amendment prohibits imposition of arbitrary punishments).

Installation damages consisted of the additional costs to be incurred by plaintiffs in removing non-OEM parts from their vehicles and replacing them with OEM parts. Included in these damages was an amount to cover two days of car rental while the non-OEM parts were being replaced. Only those class members who actually had non-OEM parts installed on their vehicles were eligible to receive installation damages. Plaintiffs' expert, Dr. Mathur, explained that, for a variety of reasons, many plaintiffs who had non-OEM parts specified on their repair estimates did not, in fact, have non-OEM parts installed on their vehicles. These plaintiffs were not eligible for installation damages. Thus, in order to calculate the amount of installation damages for the nationwide class, it was necessary to estimate the number of plaintiffs who were eligible for such damages. Mathur estimated that, of the total number of plaintiffs who were quoted non-OEM parts, the percentage whose vehicles were, in fact, repaired with non-OEM parts ranged from 50% to 92%. In other words, although each class member's estimate, by definition, specified *non-OEM* parts, *OEM* parts were actually installed on the class members' cars as often as 50% of the time. Mathur testified that, in his view, the actual figure for repairs using non-OEM parts probably

was closer to 92% than 50%. He calculated that, if 50% of class members received non-OEM parts, installation damages for the class as a whole would total \$658,450,000. If, on the other hand, the correct figure were 92%, installation damages would total \$1.2 billion.

On cross-examination, Mathur acknowledged that, with regard to installation damages, it was necessary to determine whether a non-OEM part had been installed on a class member's vehicle. However, Mathur conceded that he had no way of making this determination. Mathur also acknowledged that he had "no opinion" as to how many class members had non-OEM parts installed on their vehicles but later received fair market value for them. Mathur admitted that his calculations as to installation damages might be incorrect by as much as \$1 billion.

The following exchange took place between counsel for State Farm and Mathur.

"Q. From an economic perspective, there is simply no way for you to identify which members of the class are entitled to damages; isn't that right?

A. Well, I don't have the data, and so I really cannot identify who the class members are.

Q. Therefore, there is no way for you to identify who is and who is not entitled to damages; isn't that right, sir?

A. That is correct."⁷

⁷ John Werner, an assistant director in State Farm's research division, testified that, while the company's computer system could tell what kind of part was specified on an estimate, it could *not* tell what

(Continued on following page)

The jury awarded plaintiffs \$212,440,000 in installation damages. This was about \$1 billion less than Mathur's high-end estimate.

While it has become acceptable to use statistical inference in determining aggregate damages in a class action suit (e.g., 3 A. Conte & H. Newberg, *Newberg on Class Actions* § 10:2, at 478 (4th ed.2002)), it also is understood that the possibility of error involved in such an approach may exceed constitutional bounds. See, e.g., *Bell v. Farmers Insurance Exchange*, 115 Cal.App.4th 715, 746-57, 9 Cal.Rptr.3d 544, 571-80 (2004). In *Bell*, for example, the court rejected a determination of aggregate damages, noting that "the possible inaccuracy of the estimate of unpaid double-time compensation presents an issue of constitutional dimension." *Bell*, 115 Cal. App. 4th at 756, 9 Cal.Rptr.3d at 579. See also *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020-21 (5th Cir. 1997) ("a procedure is inherently unfair when the substantive rights of *** the defendant are resolved in a manner that lacks the requisite level of confidence in the reliability of its result").

In the case at bar, the range between Mathur's high-end and low-end estimates for installation damages was half a billion dollars. Moreover, as previously indicated, Mathur conceded that his estimates could be incorrect by as much as \$1 billion. A due process violation is clearly established where the method for determining damages has the potential to increase a defendant's aggregate liability by as much as \$1 billion over what is warranted.

kind of part, whether OEM or non-OEM, was actually installed on a policyholder's vehicle.

See *Bell*, 115 Cal.App. 4th at 751-53, 9 Cal.Rptr.575-76; *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir.1996).

Notwithstanding the foregoing, the appellate court below concluded that there was "little danger that ineligible class members will receive a share of this award [installation damages]." 321 Ill.App.3d at 290. In support of this view, the appellate court pointed, *inter alia*, to the size of the jury's installation damages award, which was "approximately \$1 billion less than the expert's estimate." 321 Ill.App.3d at 289. Unlike the appellate court, we find little comfort in the size of the jury's installation damages award. In our view, it is troubling, rather than reassuring, that Mathur's half-billion-dollar range for installation damages was found by the jury to be too narrow, by another half-billion dollars. In other words, the jury had so little confidence in even the lowest estimate for installation damages that the jury found it necessary to reduce that figure by \$500 million. This suggests that the jury's award of aggregate installation damages was based, not on Mathur's expert testimony, but on pure speculation and conjecture.

The potential for inaccuracy in Mathur's installation-damages estimates is simply too great to support an award of damages. See *Bell*, 115 Cal.App.4th at 751-56, 9 Cal.Rptr.3d at 575-79. While expert testimony in support of damages awards may be couched in terms of probabilities or possibilities, there is a need for a reasonable degree of certainty in such testimony. See *Brown v. Chicago & North Western Transportation Co.*, 162 Ill.App.3d 926, 937-38 (1987). Here, given the fact that Mathur conceded that the margin of error in his estimate of the amount of installation damages was a billion dollars, the requisite degree of reasonable certainty is lacking. In our view,

there is no valid basis for upholding the award of installation damages for the nationwide class and, thus, no valid basis for awarding such damages with regard to a subclass.

In sum, the jury verdict on the breach of contract claim cannot be affirmed. The jury was incorrectly instructed that the operative language in State Farm's various policy forms could be given a uniform interpretation. Further, the verdict cannot be affirmed for any subclass comprised of policyholders who were insured under any of the relevant individual policy forms. The reason is that plaintiffs' claim for breach of contract fails on the merits. State Farm's specification of non-OEM parts did not constitute a breach of any of the relevant individual policy forms, whether the policies at issue were those containing the "like kind and quality" promise, or those containing the "pre-loss condition" and the "you agree" language, or whether the policies at issue were the Massachusetts or "assigned risk" policies. Moreover, plaintiffs have failed to establish contract damages. With regard to specification damages, there is no basis in the law for this theory. In addition, while the installation damages were derived from a model based on an actual loss, the evidence offered in support of them was too speculative and uncertain to support an award of damages. Accordingly, we reverse the jury's verdict that State Farm breached its contractual obligations. In view of our disposition of plaintiffs' contract claim, we need not reach State Farm's other arguments with regard to breach of contract.

One point raised by the dissent merits response. The dissent states that this court has "ben[t] over backwards" to rule in State Farm's favor (slip op. at 98 (Freeman, J.,

concurring in part and dissenting in part)), that we have "vilifi[ed]" and "humiliated" plaintiffs' counsel (slip op. at 103, 110 (Freeman, J., concurring in part and dissenting in part)) and "demeaned" the courts below (slip op. at 110 (Freeman, J., concurring in part and dissenting in part)), and that the result in this case has not been arrived at by an even-handed application of the law, but because this court has developed "a new hostility" to class actions and wishes to "send[] a message" that "different standards" will be applied to cases arising out of the Fifth District of our appellate court (slip op. at 110 (Freeman, J., concurring in part and dissenting in part)).⁸ In other words, according to the dissent, this court's decision to reverse the verdict on plaintiffs' breach of contract count is the result of bias and extralegal considerations. This is emphatically not true. This appeal has been decided pursuant to the same standards that are applied to every case that is brought before this court. Moreover, we have not fashioned any changes to the legal rules governing class actions, let alone ones that are "hostile" to this procedural device. In deciding plaintiffs' breach of contract claim we have not acted with bias or favoritism but, instead, have applied the law objectively to the facts of record with no purpose other

⁸ The dissent agrees that the verdict in favor of plaintiffs on the consumer fraud count must be reversed in its entirety. 216 Ill.2d at 234-35, 296 Ill.Dec. at 527-28, 835 N.E.2d at 880-81 (Freeman, J., concurring in part and dissenting in part, joined by Kilbride, J.). Thus, the dissent's statement that this court is now employing "different standards" to class action cases arising out of the Fifth District (216 Ill.2d at 238, 296 Ill.Dec. at 529, 835 N.E.2d at 882 (Freeman, J., concurring in part and dissenting in part, joined by Kilbride, J.)), must apply only to those cases alleging breach of contract.

than to reach a just result. The dissent's assertions to the contrary are unfounded and inappropriate.

II. Consumer Fraud Act

State Farm raises several arguments regarding the circuit court's judgment that State Farm violated the Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act or Act) (815 ILCS 505/2 (West 1998)). Before addressing these arguments, we examine the factual background of plaintiffs' consumer fraud count in detail.

This case did not begin as a consumer fraud action. As originally pled, plaintiffs' class action complaint contained only a single count for breach of contract. Plaintiffs added count II, in which they alleged that State Farm violated the Consumer Fraud Act, in their "Second Amended Class Action Complaint (A)."

Although their class action complaint was subsequently amended, the relevant portion of plaintiffs' consumer fraud count remained unchanged. In their consumer fraud count, plaintiffs alleged the following:

"Among the unlawful practices that defendant engaged in was the practice of installing non-OEM crash parts in its insureds' vehicles that were inferior, substandard parts, when State Farm had promised and was obligated to undertake repairs on damaged vehicles using only parts of like kind and quality, so as to restore the vehicles to their pre-loss condition.

* * * By way of false or deceptive pretenses, acts, or practices, defendant did not disclose to plaintiffs that they were: a) using inferior, imitation

parts that diminished the value of their vehicles; and/or b) paying the cost of cheaper imitation parts when available and refusing to pay for OEM parts, thereby causing class members and/or their repair shops to absorb the cost difference."

After plaintiffs added their consumer fraud count, State Farm argued that it was simply a duplicate of the breach of contract count and, therefore, should be dismissed. State Farm pointed in particular to the language in plaintiffs' complaint which asserts that State Farm violated the Consumer Fraud Act by installing inferior parts despite having "promised" to use parts of "like kind and quality."⁹ This language, according to State Farm, was nothing more than a restatement by plaintiffs that State Farm had breached a contractual promise. And, State Farm argued, under decisions such as *DeLeon v. Beneficial Construction Co.*, 55 F.Supp.2d 819, 826 (N.D.Ill.1999), and *Petri v. Gatlin*, 997 F.Supp. 956, 967-68 (N.D.Ill.1997),

⁹ Plaintiffs made similar statements in various other filings in the circuit court. For example, in "Class Plaintiffs' Reply to State Farm's Informational Memorandum of Law on Plaintiffs' Causes of Action," plaintiffs wrote the following: "State Farm contends that 'Plaintiffs have only vaguely alluded to any specific misrepresentation or omission.' See Def. Mem. at 13. This contention is ludicrous. Plaintiffs repeatedly have stated that 'State Farm's practice of promising in Plaintiffs' policies to restore Plaintiffs' vehicles to pre-loss condition by using parts of like kind and quality, but nonetheless using inferior non-OEM crash parts which were not of like kind and quality and which did not restore Plaintiffs' vehicles to their pre-loss condition violated the CFA [Consumer Fraud Act]." Similarly, in their written opposition to State Farm's motions for summary judgment on class claims and against the named plaintiffs, plaintiffs identified the fraudulent misrepresentation as "State Farm's promis[e] in the policy to restore Plaintiffs' vehicles to pre-loss condition by using parts of like kind and quality."

a breach of a contractual promise cannot serve as the basis for a statutory consumer fraud action.

Confronted with the argument that its consumer fraud count was simply a redressed version of its breach of contract count, plaintiffs retreated somewhat from the language in their complaint. During the hearing on State Farm's motion to decertify the class and motions for summary judgment, plaintiffs clarified to the circuit court that the consumer fraud count was not premised on "the drafting, or the sale or even the interpretation" of a contract. Instead, according to plaintiffs, the consumer fraud count was based on actions, representations and omissions which occurred during the claims process, *i.e.*, after the policyholder brought his or her car to an adjuster or body shop to receive an estimate and repair. This shift in emphasis was significant. By focusing on statements and actions which occurred during the claims process, rather than promises contained in the contract, plaintiffs were able to persuade the circuit court that the consumer fraud count was truly independent from the breach of contract count. Thus, as the circuit court noted, the jury could "say there's a breach of contract, but that doesn't necessarily mean there's been Consumer Fraud."

In support of their argument that State Farm made fraudulent representations and omissions during the claims process, plaintiffs relied on four documents. The first document was the estimate given to each of the named plaintiffs after his or her car had been examined by a State Farm claims adjuster. Each of these estimates consisted of a computer-generated printout that listed the parts that were to be put on the plaintiff's car, along with the prices of the parts. The estimates also give the source or type of each part. Non-OEM parts are listed as "Quality

Replacement Parts," while OEM parts are listed along with the manufacturer's name. Although the named plaintiffs' estimates varied because of the individual nature of the repairs, each estimate used the term "quality replacement part." Thus, for example, on plaintiff Sam DeFrank's estimate, the "Part Type" for the various parts on the estimate is listed as "Quality Replacement Part," "GM Part" or "Order From Dealer." Plaintiffs alleged that each member of the class, like DeFrank, received an estimate that included the term "quality replacement part." A copy of DeFrank's estimate is attached to this opinion as Appendix A.

Stamped on DeFrank's estimate in the upper left-hand corner of the first page are the words, "Read the Attached Information Regarding Quality Replacement Parts Not Made By The Original Equipment Manufacturer." This statement refers to a document, known as a "half sheet," which was attached to repair estimates that included non-OEM parts. On the half sheet is a disclosure which states, in part, "THIS ESTIMATE HAS BEEN PREPARED BASED [sic] ON THE USE OF AFTERMARKET CRASH PARTS SUPPLIED BY A SOURCE OTHER THAN THE MANUFACTURER OF YOUR MOTOR VEHICLE." A copy of the half sheet is attached to this opinion as Appendix B.

The second item relied upon by plaintiffs was a brochure produced by State Farm titled "Quality Replacement Parts." This brochure was allegedly given to each member of the consumer fraud class, usually at the time the insured received his or her estimate. In this brochure, State Farm refers to non-OEM parts as "quality replacement parts" and states that "[o]nly those parts which meet our very high performance criteria are acceptable." Also

included in the brochure is a guarantee which states that if the policyholder is unsatisfied with the "fit and corrosion resistance qualities" of the replacement parts, then State Farm will repair or replace the parts at no cost to the policyholder. A copy of the brochure is attached to this opinion as Appendix C.

Unlike the estimates and the brochure, the third and fourth items identified by plaintiffs – articles in a newsletter and a magazine – were not given to the policyholders during the claims process. Instead, these items were promotional or informational materials produced by State Farm. Plaintiffs used these materials to illustrate State Farm's marketing and use of the term "quality replacement parts."

The newsletter which the plaintiffs relied upon is titled "Good Neighbor News" and is dated "Fall 1993." The newsletter which is of record is in the form of a mailing and has a return address of a State Farm agent based in Michigan. The mailing address on the newsletter states generically, "Policyholder Name; Policyholder Address." A brief article discussing the high price of OEM parts appears on the third page of the newsletter. In the middle of the article there is this quote: "High prices for parts is a major reason why it costs so much to repair a car that's been damaged. And that's why State Farm is a big fan of what we call 'quality replacement parts.' These parts are identical to – or better than – the original equipment manufacturers' parts, but cost a lot less."

The fourth and final item identified by plaintiffs is an article from the April 1990 issue of a magazine called "Reflector," a State Farm publication circulated to State Farm agents. The article at issue, titled "Quality Replacement

Parts," gives a general overview of State Farm's use of non-OEM parts. Underneath the title to the article appears this caption: "One of the bumpers on the cover of this *Reflector* was produced by the original equipment manufacturer. The other is a quality replacement part produced by another company. The same is true of the other pairs [of parts shown]. The parts are identical except for one thing – the price."

As noted, the plaintiffs' focus on the actions taken by State Farm during the claims process made it possible for plaintiffs to pursue a separate count for consumer fraud. It also made possible a second important objective of plaintiffs – class certification. Because the consumer fraud claim was based on the uniform representations contained in State Farm's written claims documents and not, for example, on the myriad different oral representations that occurred during the sales of the class members' policies, plaintiffs were able to convince the circuit court that there was a common question of fact which predominated over the class. In its order certifying the nationwide consumer fraud class (in language taken verbatim from plaintiffs' filing in support of certification), the circuit court stressed the uniformity of the representations made during the claims process:

"As to the consumer fraud allegations, the facts presented at the certification hearing on State Farm's methods of disclosing to policyholders its use of non-OEM parts also demonstrates a course of conduct common to all class members. When such parts are used on an estimate, the policyholder is given a State Farm brochure discussing the use of non-OEM parts. Defendant's Exhibit 24; Certification Hearing at 0124-25. The estimate is then stamped indicating the use of non-OEM

parts. Defendant's Exhibit 27. State Farm has also promoted the use of the term 'quality replacement parts' nationwide in an effort to promote its substitution of non-OEM for OEM parts. Plaintiffs' Exhibits 115 and 116.^[10]

The Court finds that the evidence introduced at the certification hearing demonstrate 'a series of essentially identical transactions,' *Miner*, 87 Ill.2d at 19, 428 N.E.2d at 484, between State Farm and its insureds, which transactions routinely result in the use of non-OEM parts."

In its certification order, the circuit court also determined that the Consumer Fraud Act could, as a matter of statutory interpretation, be applied to members of the plaintiff class who did not reside in Illinois. The court further concluded that applying the Consumer Fraud Act to the entire class presented no choice-of-law or constitutional problems. In its subsequent "Order Regarding Law to be Applied to Class Members' Claims," the circuit court explained its reasoning:

"With respect to the claims under the Illinois Consumer Fraud Act, the court finds there are no true conflicts of law raised by the specific claims or facts at issue in this case which require application of the law of any state other than Illinois. *Martin v. Heinhold Commodities, Inc.*, 117 Ill.2d 67, 510 N.E.2d 840 (1987) and *Gordon v. Boden*, 224 Ill.App.3d 195, 586 N.E.2d 461 (1st Dist.1991) have approved the application of the Illinois

¹⁰ Plaintiffs' exhibits 115 and 116 are two internal State Farm memoranda which discuss the term "quality replacement parts." There is no allegation that these memoranda were ever seen by any member of the class.

Consumer Fraud Act to the claims of out-of-state plaintiffs. State Farm was chartered and is headquartered in Illinois. State Farm affirmatively uses and consents to the jurisdiction of Illinois courts. It is alleged that the conduct at issue emanated from activities in Illinois. Given the aggregation of contacts of State Farm with this jurisdiction, and the allegations that the conduct at issue emanated from activities in Illinois, Illinois possesses sufficient contacts so that the application of the Illinois Consumer Fraud Act to all class claims is neither unreasonable nor unfair and comports with due process. Further, application of the Illinois Consumer Fraud Act to all claims will not interfere with any other jurisdictions' legislative, regulatory or administrative policies * * * ."

Based on its finding that a common fact predominated, and that the Consumer Fraud Act could be applied to out-of-state residents, the circuit court certified a nationwide class consisting of

"[a]ll persons in the United States, except those residing in Arkansas and Tennessee, who, between July 28, 1994, and February 24, 1998, (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory authorized and/or non-OEM * * * 'crash parts' installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts."

At trial, the five named plaintiffs testified to the representations made and actions taken by State Farm during each of their claims proceedings. Each plaintiff stated that he or she had received a car-repair estimate, and all but one

stated that they had received the "Quality Replacement Parts" brochure. The point in the repair process at which the plaintiffs received the brochure, and whether they read it, varied from plaintiff to plaintiff. Shadle, for example, testified that he received his estimate and "Quality Replacement Parts" brochure when the claims adjuster first looked at his car, but that he did not read the brochure. Avery stated that he received his estimate and brochure in the mail after taking his car to an adjuster, that he read the brochure, and that he was "extremely concerned" about what it said. Vickers first saw her written estimate when she went to pick up her car after it was repaired, although her body shop told her early in the repair process that non-OEM parts were going to be used. She did not say whether she received or read the brochure. Like Vickers, Covington did not see his estimate prior to the repairs being started, although his body shop informed him that non-OEM parts were being used. Covington received and read his brochure after the repairs were finished. DeFrank testified that he received his estimate and brochure from the claims adjuster prior to the repair of his pickup truck. He read the brochure and became "very upset." Notably, none of the five plaintiffs testified that they saw, read or were aware of the articles in the "Good Neighbor News" newsletter or the "Reflector" magazine.

At the conclusion of trial, the circuit court found that State Farm had violated the Consumer Fraud Act with respect to the five named plaintiffs and the class as a whole. In its judgment order, the circuit court noted that a violation of the Consumer Fraud Act could not be proven simply by showing a breach of a contractual promise:

"The court, after considering all the evidence, finds, as did the jury, that State Farm did breach its contract with the plaintiffs, that the non-OEM 'crash parts' specified and used by State Farm were not of 'like kind and quality' and did not restore plaintiffs' vehicles to their pre-loss condition as required by the insurance contract between State Farm and the plaintiffs. These findings do not on their own establish a violation of the Act. The court must now consider whether the evidence also establishes the elements, set forth above, which are required to prove a violation of the Consumer Fraud Act."

After stating the above, the circuit court set forth what it concluded were the deceptive acts perpetrated by State Farm. The circuit court stated:

"The plaintiffs allege, under Count II and Count III of the Third Amended Class Action Complaint, that State Farm violated the Consumer Fraud Act. The Plaintiffs['] allegations include, without limitation, that State Farm installed inferior non-OEM 'crash parts' on the plaintiffs' vehicles when it was obligated under its insurance policies with the plaintiffs to use 'crash parts' of 'like kind and quality' which would restore plaintiffs' vehicles to their 'pre-loss condition' and that State Farm failed to disclose to plaintiffs that it was using and paying for cheaper, inferior non-OEM 'crash parts' to repair plaintiffs' vehicles.

After considering all the testimony and evidence admitted at trial, the court finds that the plaintiffs have proven that State Farm violated the Consumer Fraud Act and that none of the defenses asserted by State Farm bar plaintiffs' right to recover under the Act or reduce the amount of plaintiffs' recovery.

State Farm, prior to and during the class period for the Consumer Fraud Act plaintiffs, knew that the non-OEM 'crash parts' it was specifying on its policyholders' repair estimates were not of 'like kind and quality' and would not restore their policyholders' vehicles to 'pre-loss condition.' State Farm's knowledge of the inferiority of the non-OEM 'crash parts' is clearly shown [sic] the testimony of witnesses, State Farm's own internal documents, CAPA documents (State Farm was instrumental in the creation of CAPA. CAPA's stated purpose was to certify quality non-OEM 'crash parts' and State Farm officers and management served on CAPA's board prior to and during the class period for Consumer Fraud Act plaintiffs) of which State Farm had knowledge, and other documents, all of which were admitted into evidence and appear in the trial court record. Rather than telling its policyholders of the known problems with the non-OEM 'crash parts,' including possible safety concerns, State Farm chose to adopt and use on its estimates the misleading term 'Quality Replacement Parts,' and to tell its policyholders, in various written documents which were admitted into evidence, that the parts were as good, or better than, OEM parts. Further, the written disclosures stamped on or attached to the repair estimates or which were delivered with the repair estimates, did nothing to advise the State Farm policyholder of the inferiority of the parts. Finally, State Farm's 'Guarantee' improperly and unfairly placed the burden of securing a quality repair on the policyholder, not State Farm.

State Farm is a mutual insurance company which operates for the benefit of its policyholders. State Farm occupies a position of trust with its policyholders, who pay the required premiums and are entitled to receive all the

benefits State Farm promises to provide in its insurance contract with them. State Farm violated this trust. The court finds that State Farm, in light of its knowledge of the inferiority of non-OEM 'crash parts,' misrepresented, concealed, suppressed or omitted material facts concerning the non-OEM 'crash parts,' with the intent that its policyholders rely upon on [sic] these deceptions, in violation of the Consumer Fraud Act."

In succinct fashion, the circuit court also held that State Farm's deceptive acts had proximately caused the named plaintiffs and the class as a whole actual damages and that the actual damages were defined in the same terms as they were under the breach of contract count:

"The court further finds that as a direct and proximate result of State Farm's violation of the Consumer Fraud Act, the plaintiffs were injured and incurred actual damages; namely the specification/direct damages and installation damages which occurred during the class period for Consumer Fraud Act plaintiffs."

Because the consumer fraud damages were identical to the breach of contract damages, the circuit court reasoned that an award of actual damages for consumer fraud would constitute a double recovery. The circuit court therefore declined to award plaintiffs "actual economic damages" (815 ILCS 505/10a(a) (West 2002)) under the Consumer Fraud Act. The circuit court did, however, award plaintiffs \$130 million in "disgorgement" damages and \$600 million in punitive damages.

On appeal, the appellate court affirmed the circuit court's certification of a nationwide class for consumer fraud. As in the circuit court, the appellate court held that

a common question of fact predominated for the class based upon State Farm's uniform practice of specifying non-OEM parts and providing its insureds with a written estimate and a "Quality Replacement Parts" brochure:

"In regard to the consumer-fraud claim, the record contained evidence that State Farm engaged in an ongoing course of conduct nationwide, in which it specified inferior non-OEM parts whenever those parts were cheaper and available, that State Farm knew those parts were inferior, that State Farm did not inform its policyholders of the problems with those parts, and that State Farm affirmatively misrepresented the condition of those parts by assuring policyholders – on the damage estimates and in brochures – that it specified only 'quality replacement parts' and that it guaranteed the parts at no additional cost." 321 Ill.App.3d at 280-81.

Like the circuit court, the appellate court also held that the Consumer Fraud Act could be applied to consumers residing out-of-state. Citing *Martin v. Heinold Commodities, Inc.*, 117 Ill.2d 67 (1987), the appellate court determined that non-Illinois consumers are "permitted to pursue an action under the Act against a resident defendant where the deceptive acts and practices [are] perpetrated in Illinois." 321 Ill.App.3d at 281. The appellate court then concluded: "The evidence demonstrates that the deceptive claims practices occurred in Illinois. It was in Illinois that the claims practices were devised and procedures for implementation were prepared for dissemination in other states." 321 Ill.App.3d at 282. Finally, the appellate court affirmed the circuit court's finding that there were "no true conflicts" between the Consumer Fraud Act and other states' consumer fraud laws and that "Illinois has significant

contacts to the claims asserted by each class member.” 321 Ill.App.3d at 282. From this, the appellate court concluded that there was no constitutional barrier to applying the Consumer Fraud Act to the claims of plaintiffs who resided out-of-state. 321 Ill.App.3d at 282-83.

With respect to the merits of the claim, State Farm repeated its argument to the appellate court that plaintiffs’ consumer fraud claim was nothing more than a restatement of the breach of contract claim. Citing to several decisions from the appellate court in support of this argument, including *Zankle v. Queen Anne Landscaping*, 311 Ill.App.3d 308, 312 (2000), State Farm argued that the trial court’s finding of liability under the Consumer Fraud Act should be reversed. The appellate court rejected this contention, finding that “[t]he evidence of State Farm’s deceptive claims practices moves this case beyond a mere contract breach.” 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23).

State Farm also argued to the appellate court that it was not liable under the Consumer Fraud Act for the affirmative representations it made to plaintiffs because those representations were merely puffing and, therefore, not actionable. The appellate court rejected this argument, stating:

“In our view, [State Farm’s] representations assigned ‘virtues’ to non-OEM parts that they did not possess. See *Totz v. Continental Du Page Acura*, 236 Ill.App.3d 891, 905 (1992); *Rumford v. Countrywide Funding Corp.*, 287 Ill.App.3d 330, 336 (1997). They are representations that a reasonable policyholder would have interpreted as fact.” 321 Ill.App.3d 269 (quote contained in a

portion of the opinion unpublished under Supreme Court Rule 23).

Finally, State Farm argued to the appellate court that the evidence was insufficient to establish that the actions, representations or omissions which occurred during the claims process proximately caused injury to any of the class members. The appellate court rejected this argument too:

"Plaintiffs presented evidence that the non-OEM parts which State Farm specified were categorically inferior, that State Farm specified non-OEM parts that it knew to be inferior, that State Farm did not inform its policyholders that the non-OEM parts it specified were inferior, and that State Farm knowingly represented on its estimates, in its 'Quality Replacement Part[s]' brochures, and through its estimators that these non-OEM parts were of equal quality or better than OEM parts. There is evidence that State Farm's material misrepresentations led numerous class members to blindly accept the non-OEM parts specified (*i.e.*, without knowledge of the inferior condition of those parts). See *Perona* 292 Ill.App.3d at 68-69; *Johnston v. Anchor Organization for Health Maintenance*, 250 Ill.App.3d 393, 397 (1993). There is overwhelming evidence of State Farm's calculated deception of its policyholders in a deliberate disregard of its express written promises contained in the policies issued. The deceit was deliberate and universally employed for the purpose of obtaining unearned, illegitimate monetary gain. This was an ill-gotten gain, acquired at the expense of persons that trusted and relied upon State Farm for honest, fair treatment. There is an abundance of evidence to support the trial court's finding that the class

members' injuries were proximately caused by State Farm's deceptive conduct." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23).

Based on this reasoning, the appellate court affirmed the judgment of the circuit court holding that State Farm had violated the Consumer Fraud Act. The appellate court also affirmed the circuit court's \$600 million punitive damage award. However, the appellate court reversed the \$130 million in disgorgement damages, holding that it constituted an impermissible double recovery. State Farm then appealed.

On appeal, State Farm contests the circuit court's certification of a nationwide consumer fraud class, as well as the circuit court's judgment in favor of plaintiffs on the merits. We first examine, however, the nature of plaintiffs' consumer fraud claim.

A. *Plaintiffs' Consumer Fraud Claim*

Surprisingly, although plaintiffs' allegation of consumer fraud has been in litigation for several years, and a statutory consumer fraud claim must be pled with specificity (*Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 501 (1996)), there is still some confusion – as evinced by plaintiffs' arguments before this court – as to exactly what conduct of State Farm is at issue under the consumer fraud claim. To clarify what is at issue, it will be helpful to identify that conduct which we can readily conclude does *not* support plaintiffs' consumer fraud claim.

1. Plaintiffs' Consumer Fraud Claim May Not Be Based on a Breach of a Promise Contained in Their Insurance Policies

Before the circuit court, plaintiffs maintained that their consumer fraud count was not based on "the drafting, or the sale or even the interpretation" of any class member's insurance policy. Yet in their brief before this court, plaintiffs repeatedly point to State Farm's contractual promises to define the consumer fraud. Plaintiffs state, for example, that State Farm disregarded "the express written promises in its policies," that there was "no evidence that Plaintiffs or the class knew, expected or understood that State Farm would specify parts that failed to fulfill its contractual obligations," and that "[t]he law implies and recognizes the expectation, understanding and belief that State Farm would fulfill its contractual obligation." Similarly, although both the circuit court and the appellate court stated that plaintiffs' consumer fraud count was not based on a breach of a contractual promise, each court referenced State Farm's failure to fulfill its policy obligations in its analysis of plaintiffs' consumer fraud claim. The appellate court in particular, in upholding the circuit court's consumer fraud judgment, pointedly relied on State Farm's "deliberate disregard of its express written promises contained in the policies issued." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23). These repeated references to simple breaches of contractual promises in support of the consumer fraud count are in error.

A breach of contractual promise, without more, is not actionable under the Consumer Fraud Act. *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233, 130 L.Ed.2d 715, 728, 115 S.Ct. 817, 826 (1995), quoting *Golembiewski v. Hallberg Insurance Agency, Inc.*, 262 Ill.App.3d 1082, 1093 (1994). As our appellate court has explained:

"What plaintiff calls 'consumer fraud' or 'deception' is simply defendants' failure to fulfill their contractual obligations. Were our courts to accept plaintiff's assertion that promises that go unfulfilled are actionable under the Consumer Fraud Act, consumer plaintiffs could convert any suit for breach of contract into a consumer fraud action. However, it is settled that the Consumer Fraud Act was not intended to apply to every contract dispute or to supplement every breach of contract claim with a redundant remedy. See *Law Offices of William J. Stogsdill v. Cragin Federal Bank for Savings*, 268 Ill.App.3d 433, 437-38 (1995); *Golembiewski v. Hallberg Insurance Agency, Inc.*, 262 Ill.App.3d 1082, 1093 (1994). We believe that a 'deceptive act or practice' involves more than the mere fact that a defendant promised something and then failed to do it. That type of 'misrepresentation' occurs every time a defendant breaches a contract." *Zankle v. Queen Anne Landscaping*, 311 Ill.App.3d 308, 312 (2000).

Accord, e.g., *Kleczech v. Jorgensen*, 328 Ill.App.3d 1012, 1022 (2002); *Lake County Grading Co. of Libertyville, Inc. v. Advance Mechanical Contractors, Inc.*, 275 Ill.App.3d 452, 460 (1995); *Exchange National Bank v. Farm Bureau Life Insurance Co. of Michigan*, 108 Ill.App.3d 212, 216 (1982); *DeLeon v. Beneficial Construction Co.*, 55 F.Supp.2d 819, 826 (N.D.Ill.1999); *Petri v. Gatlin*, 997 F.Supp. 956, 967-68 (N.D.Ill.1997).

Both the circuit court and appellate court recognized this principle but both courts failed to apply it consistently. As a matter of law, plaintiffs' consumer fraud claim may not be based on the assertion that State Farm breached its promise to restore plaintiffs' vehicles to their

“pre-loss condition” or that State Farm breached its promise to repair plaintiffs’ vehicles using parts of “like kind and quality.”

2. This Case Is Not About the Specification of Defective Parts

Before this court, plaintiffs do not claim to have proven that any of the non-OEM parts specified by State Farm in its repair estimates were defective. This is in keeping with plaintiffs’ position at trial. Plaintiffs deliberately avoided any theory relating to defective parts at trial because such a theory would have significantly increased their burden of proof. Such a theory would also have rendered class certification far less likely, since the common question of fact or law necessary for certification would have been more difficult to establish if plaintiffs had been forced to prove that each individual non-OEM part, or grouping of parts, was defective. Thus, before the circuit court, plaintiffs’ counsel made it very clear that they were *not* trying to prove that any of the non-OEM parts at issue were defective, at one point saying: “[A]s we’ve stated this is not a defect case. We are not proving and we are not required to prove that the parts are defective.”

What plaintiffs do claim to have established at trial is a proposition far more general than whether any of the specified non-OEM parts were defective. Plaintiffs claim to have proven that non-OEM parts, as a whole, are not as good as OEM parts. Or, to use plaintiffs’ terminology, that non-OEM parts are “categorically inferior” to OEM parts. But “categorically inferior” is not the same thing as “categorically defective.” This point is important.

In their written opinions, both the circuit court and the appellate court refer to State Farm's specification of "categorically inferior" parts as if the act of specifying nondefective parts, by itself, is fraudulent. The appellate court, for example, in describing State Farm's allegedly deceptive acts, notes that "[p]laintiffs presented evidence that the non-OEM parts which State Farm specified were categorically inferior, [and] that State Farm specified non-OEM parts that it knew to be inferior." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23). However, it is no more fraudulent – in and of itself – to specify non-OEM parts while knowing that they are not as good as OEM parts than it is to sell Chevrolet automobiles while knowing that they are not as good as Cadillacs. Whether the consumer product is automobiles, toasters or something else, there will always be some brands of that product that are not as good as, or which are "categorically inferior" to, other brands of the same product. The state's economy would come to a grinding halt if the sale of anything less than the single, best brand of every consumer good were considered fraudulent.

What makes the specification of the *nondefective*, non-OEM part potentially fraudulent are the statements which are made, or not made, about the product. It is the omissions and representations State Farm made about non-OEM parts – not simply the act of specifying non-OEM parts – that must form the basis of plaintiffs' consumer fraud action.

3. The Representations Which Form the Basis of Plaintiffs' Cause of Action for Consumer Fraud Do Not Include the Statement That Non-OEM Parts Are as Good as OEM Parts

The appellate court based its holding that State Farm violated the Consumer Fraud Act, in part, on its findings that "State Farm knowingly represented on its estimates [and] in its 'Quality Replacement Parts' brochures" that non-OEM parts "were of equal quality or better than OEM parts." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23). These findings, however, are incorrect. Neither the written estimates nor the "Quality Replacement Parts" brochures which the named plaintiffs received from State Farm contain the statement that non-OEM parts are "of equal quality to or better than OEM parts." See Appendix A and Appendix C.

As previously noted, two of the State Farm documents relied upon by plaintiffs in this case, the "Good Neighbor News" newsletter and the "Reflector" magazine, do contain the statement that non-OEM parts are as good as, or better than, OEM parts. However, there is no evidence that any of the named plaintiffs ever read, saw or were in any way aware of these documents. This is not surprising. The "Good Neighbor News" newsletter which is of record is dated "Fall 1993," one year before the starting date of the consumer fraud class period and approximately three years before the earliest of the five named plaintiffs' accidents occurred. The "Reflector" magazine article was circulated to State Farm agents, not policyholders, and was published in 1990, some six years before the earliest of the named plaintiffs' accidents and four years before the starting date of the class period.

In its order certifying the nationwide consumer fraud class, the circuit court wrote that "State Farm has also promoted the use of the term 'quality replacement parts'

nationwide in an effort to promote its substitution of non-OEM for OEM parts.” This sentence seems to suggest that the circuit court found the newsletter and magazine articles relevant to all policyholders, regardless of whether they saw them or not, because the articles helped create a nationwide market for non-OEM parts. However, we explicitly rejected this “market theory” of causation in *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134 (2002), and again, more recently, in *Shannon v. Boise Cascade Corp.*, 208 Ill.2d 517 (2004). Accordingly, neither the “Good Neighbor News” newsletter nor the “Reflector” magazine has any relevance to this case, and the statement that non-OEM parts are “of equal quality to or better than OEM parts” simply does not support plaintiffs’ consumer fraud claim.

4. Describing a Non-OEM Part as a “Quality Replacement Part” Is Puffing and, Hence, Not Actionable

Plaintiffs object to two phrases describing non-OEM parts which appear in the named plaintiffs’ estimates and in the “Quality Replacement Parts” brochure. The first phrase plaintiffs point to is “quality replacement parts.” This phrase appears in both the named plaintiffs’ estimates, as a line entry under “Part Type” (see, *e.g.*, Appendix A), and in the brochure received along with the estimate (see Appendix C). The second phrase is “very high performance criteria,” which appears in the brochure in this sentence: “Only those parts which meet our very high performance criteria are acceptable.” See Appendix C. Plaintiffs maintain that both these phrases are deceptive under the Consumer Fraud Act.

State Farm, however, contends that these phrases are merely “puffing” and, hence, cannot form a basis for

plaintiffs' consumer fraud claim. We agree. "Puffing" denotes the exaggerations reasonably to be expected of a seller as to the degree of quality of his or her product, the truth or falsity of which cannot be precisely determined. See, e.g., *Speakers of Sport, Inc. v. ProServ, Inc.*, 178 F.3d 862, 866 (7th Cir.1999) ("Puffing in the usual sense signifies meaningless superlatives that no reasonable person would take seriously, and so it is not actionable as fraud"). Such statements include subjective descriptions relating to quality. See, e.g., *Evanston Hospital v. Crane*, 254 Ill.App.3d 435, 439, 444 (1993) ("high-quality"); *Breckenridge v. Cambridge Homes, Inc.*, 246 Ill.App.3d 810, 823 (1993) ("expert workmanship," "custom quality," "perfect"); *Zimmerman v. Northfield Real Estate, Inc.*, 156 Ill.App.3d 154, 163 (1986) ("magnificent," "comfortable"); *Spiegel v. Sharp Electronics Corp.*, 125 Ill.App.3d 897, 902 (1984) ("picture perfect"); see also *State v. American TV & Appliance of Madison, Inc.*, 146 Wis.2d 292, 302, 430 N.W.2d 709, 712 (1988) ("A general statement that one's products are best is not actionable as a misrepresentation of fact"). Describing a product as "quality" or as having "high performance criteria" are the types of subjective characterizations that Illinois courts have repeatedly held to be mere puffing. Thus, as a matter of law, neither phrase can be considered deceptive under the Consumer Fraud Act.

Plaintiffs nevertheless point out that the circuit court found that the phrase "quality replacement parts" was "misleading." However, the circuit court did not cite to, or distinguish, any of the decisions cited above which hold that subjective statements of quality are merely puffing. Moreover, the circuit court did not cite any evidence to support its finding that the phrase was "misleading" and

never made any determination that the phrase "quality replacement parts" stated a deceptive fact.

The appellate court, unlike the circuit court, did conclude that State Farm made representations "that a reasonable policyholder would have interpreted as fact." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23). The appellate court determined that State Farm's "representations assigned 'virtues' to non-OEM parts that they did not possess" and, therefore, the representations violated the Act. 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23). However, the appellate court's conclusion that State Farm's "representations assigned 'virtues' to non-OEM parts that they did not possess" is based on a misstatement of the facts. The appellate court found that State Farm "represented on its estimates" and "in its Quality Replacement Part[s] brochures" that "non-OEM parts were of equal quality or better than OEM parts." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23). As noted, this is incorrect. The statement that non-OEM parts are as good as OEM parts does not appear in either the named plaintiffs' estimates or the "Quality Replacement Parts" brochure.

There is no basis for concluding, as plaintiffs contend, that the phrases "quality replacement parts" and "high performance criteria" are anything other than puffing. Thus, these phrases cannot support plaintiffs' consumer fraud claim.

5. The Guarantee Provided by State Farm
Cannot Form a Basis for Plaintiffs' Con-
sumer Fraud Claim

The circuit court held that State Farm violated the Consumer Fraud Act by providing a guarantee which states that if the policyholder is unsatisfied with the "fit and corrosion resistance qualities" of a replacement part, then State Farm will repair or replace the part at no cost. The circuit court concluded that this guarantee violated the Act because it "improperly and unfairly placed the burden of securing a quality repair on the policyholder, not State Farm." Plaintiffs point to this conclusion in support of their contention that State Farm violated the Act.

It is not clear what the circuit court meant when it held that State Farm's guarantee improperly put a "burden" on policyholders. Every guarantee places a burden on the consumer – the manufacturer or retailer must be notified when there is a problem with the product that is produced or sold and the guarantee must be invoked. For this reason, the circuit court cannot be correct if it meant that the guarantee is fraudulent because it required the policyholders to take action. If this were true, every guarantee, no matter how comprehensive or generous, would be inherently fraudulent.

Plaintiffs argue, however, that the guarantee put an improper burden on policyholders because it was simply too difficult to use. According to plaintiffs, State Farm adjustors would "brush off attempts to use the guarantee," getting an OEM replacement part once the guarantee was invoked could take "up to three to five days," and "[e]ven when a body shop showed State Farm that a non-OEM crash part did not fit, State Farm would still sometimes not authorize OEM parts." However, several witnesses,

including some who testified on behalf of plaintiffs, stated that the guarantee was honored in a routine fashion. For example, plaintiffs' witness Dave Beyers, the manager of a body shop in Williamson County, testified that if he had a problem with a non-OEM fender he would simply "fax up a form" to State Farm and "[p]ut the OEM fender on."

More important, none of the named plaintiffs in this case testified that they had problems using the guarantee. Indeed, none of the named plaintiffs made any attempt to invoke it. Avery and Shadle refused to have non-OEM parts put on their vehicles, so for them, the guarantee was not at issue. The other named plaintiffs, Covington, DeFrank and Vickers, did not attempt to use the guarantee. DeFrank was specifically asked whether he took "advantage of State Farm's guarantee that had been provided to [him] at the time the estimate was prepared." He answered that he had not. Accordingly, there is no basis in the record for concluding that the guarantee was unduly burdensome for the named plaintiffs, let alone for the class members as a whole.

Finally, plaintiffs point out that when a policyholder successfully used the guarantee, the amount paid to replace the non-OEM part was recorded as an indemnity payment and became part of the insured's claim file. Plaintiffs speculate that the inclusion of this information in the claim file could "possibly rais[e] the insured's rates." However, plaintiffs point to no testimony or other evidence of record to support this assertion. Thus, we conclude that the guarantee offered by State Farm cannot form a basis for plaintiffs' consumer fraud claim.

6. The Crux of Plaintiffs' Consumer Fraud Claim Is a Failure by State Farm to Disclose the Categorical Inferiority of Non-OEM Parts During the Claims Process

Having eliminated that conduct which clearly cannot support a claim for consumer fraud, what remains is the core allegation stated in plaintiffs' complaint: "By way of false or deceptive pretenses, acts, or practices, defendant did not disclose to plaintiffs that they were: a) using inferior, imitation parts * * *."

Plaintiffs' complaint does not allege that State Farm failed to disclose an inferior characteristic of any specific non-OEM part. This is to be expected, since the characteristics of one part were not always present in every other part and did not always apply to every member of the class. For example, while plaintiffs contended at trial that some non-OEM parts were not as safe as OEM parts (a proposition which State Farm vigorously disputed), this contention applied only to some of the non-OEM parts at issue, such as bumpers, which not every member of the class received. Similarly, plaintiffs' assertion that some non-OEM parts were inferior because they were not properly galvanized applied only to metal parts, not plastic. Thus, the allegedly deceptive act which was common to the entire class and every repair was not the failure to disclose a specific inferior characteristic but, rather, the failure to disclose the supposed categorical inferiority of non-OEM parts. This failure to disclose, according to plaintiffs, constitutes "the concealment, suppression or omission of any material fact" (815 ILCS 505/2 (West 1998)) in violation of the Act.

Further, the failure to disclose occurred during the claims process. Recall that State Farm's practice of giving

its policyholders a written estimate and a brochure – in which the alleged categorical inferiority of non-OEM parts was not disclosed – was precisely the basis on which the circuit court found, in its order certifying the consumer fraud class, that State Farm's conduct was common to all class members. As the circuit court stated:

“As to the consumer fraud allegations, the facts presented at the certification hearing on State Farm's methods of disclosing to policyholders its use of non-OEM parts also demonstrates a course of conduct common to all class members. When such parts are used on an estimate, the policyholder is given a State Farm brochure discussing the use of non-OEM parts. Defendant's Exhibit 24; Certification Hearing at 0124-25. The estimate is then stamped indicating the use of non-OEM parts. Defendant's Exhibit 27.”

The appellate court below correctly stated the core allegation of plaintiffs' consumer fraud claim: “Plaintiffs claimed that by adopting and employing this claims practice, State Farm deceived its policyholders in that it failed to inform them of the inferior quality of specified replacement parts.” 321 Ill.App.3d at 273. It is this allegation we must keep in mind when considering the remaining challenges raised by State Farm in this appeal.

B. Propriety of the Nationwide Consumer Fraud Class

State Farm contends that the circuit court's certification of a nationwide consumer fraud class was improper. According to State Farm, the circuit court's application of the Consumer Fraud Act to policyholders across the country was impermissible because the Act, by its own

terms, does not apply to consumer transactions involving nonresidents that occur outside Illinois. Moreover, in State Farm's view, the certification of the nationwide class violated Illinois' choice-of-law rules, as well as the full faith and credit clause, the due process clause, and the commerce clause of the federal constitution. A determination by this court that the Consumer Fraud Act does not apply, by its own terms, to the out-of-state transactions at issue in this case would render it unnecessary to address State Farm's choice-of-law and constitutional arguments. Accordingly, we consider the scope of the Consumer Fraud Act first. See, e.g., *Beahringer v. Page*, 204 Ill.2d 363, 370 (2003) (holding that constitutional questions will not be decided if case can be decided on other grounds). Because the scope of the Act is a question of statutory interpretation, our review is *de novo*. *Lucas v. Lakin*, 175 Ill.2d 166, 171 (1997).

1. Scope of the Consumer Fraud Act

Section 2 of the Consumer Fraud Act provides that "deceptive acts or practices * * * or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact * * * in the conduct of any trade or commerce are hereby declared unlawful * * * ." 815 ILCS 505/2 (West 1998). Section 10a(a) of the Act authorizes private causes of action for practices proscribed by section 2. Section 10a(a) states, in pertinent part: "Any person who suffers actual damage as a result of a violation of [the] Act committed by any other person may bring an action against such person." 815 ILCS 505/10a(a) (West 1998). To prove a private cause of action under section 10a(a) of the Act, a plaintiff must establish: (1) a deceptive

act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception. *Oliveira*, 201 Ill.2d at 149.

As noted, State Farm maintains that a nonresident consumer may not pursue a private cause of action under the Act when the disputed consumer transaction occurs out-of-state. Plaintiffs dispute this contention. To support their positions, both plaintiffs and State Farm note that a plaintiff cannot recover under the Act unless the defendant's disputed conduct involves "trade or commerce." 815 ILCS 505/2 (West 1998); *Oliveira*, 201 Ill.2d at 149. Both parties then point to section 1(f) of the Act, the provision of the Act which defines the terms "trade" and "commerce":

"(f) The terms 'trade' and 'commerce' mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situated, and shall include any trade or commerce directly or indirectly affecting the people of this State." 815 ILCS 505/1(f) (West 1998).

Plaintiffs initially state that section 1(f) "expressly notes that it applies to transactions 'wherever situated.'" This is incorrect. The words "wherever situated" do not refer to fraudulent transactions, but to the nouns "any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value." 815 ILCS 505/1(f) (West 1998). The words "wherever situated" do not expand the scope of the Act to apply to consumer transactions that take place out-of-state.

State Farm, in its argument, points to the language of section 1(f), which states that the trade or commerce must affect "the people of this State." 815 ILCS 505/1(f) (West 1998). Emphasizing the words "this State," State Farm contends that the Act is limited to transactions which take place in Illinois. Further, according to State Farm, the Consumer Fraud Act does not provide a cause of action to nonresidents whose claims processes took place outside of Illinois because those transactions had no effect on the people of Illinois. Plaintiffs, in reply, argue that the language of section 1(f) is broadly worded, and emphasize that the trade or commerce need only "indirectly affect" (815 ILCS 505/1(f) (West 1998)) the people of Illinois. From this, plaintiffs maintain that there is no geographic limit to the "trade or commerce" covered by the Act.

The language of section 1(f) has been interpreted by courts in a variety of ways. This divergence of interpretation is most notable in the federal district courts. In one of the earliest opinions to address the statute, *Seaboard Seed Co. v. Bemis Co.*, 632 F.Supp. 1133, 1140 (N.D.Ill.1986), the district court concluded that section 1(f) "defines 'trade' and 'commerce' in a geographically limited manner." See also *Bettarini v. Citicorp Services, Inc.*, No. 91 C 8390 (N.D.Ill.1992) (noting the "geographical scope of the Act" and rejecting a claim under the Act where the defendant's "complained of conduct impacted on [plaintiff] only at his home base in London"); *Swartz v. Schaub*, 818 F.Supp. 1214 (N.D.Ill.1993). Other district courts, however, have expressly disagreed with the notion that the Act is limited geographically. See *Nichols Motorcycle Supply Inc. v. Dunlop Tire Corp.*, 913 F.Supp. 1088, 1140 (N.D.Ill.1995) ("This Court believes that the Illinois Consumer Fraud Act, although intended to protect Illinois consumers, does

not contain a geographic limitation"); see also *Continental X-Ray Corp. v. XRE*, No. 93 C 3522 n. 1 (N.D.Ill.1995) (same).

Still other district courts interpreting section 1(f) have concluded that the section limits the scope of the Act based on the residency of the plaintiff. Some of the courts adopting this focus have concluded that the Act is intended only to "protect and benefit Illinois residents." *Lincoln National Life Insurance Co. v. Silver*, No. 86 C 7175 (N.D.Ill.1991), cited in *Nichols*, 913 F.Supp. at 1139. Other courts, however, have concluded that nonresidents may pursue a cause of action, although these courts typically hold that the transaction at issue must occur in Illinois or that there be an adequate "connection" to Illinois. See, e.g., *Tylka v. Gerber Products Co.*, 182 F.R.D. 573, 576-78 (N.D.Ill.1998) (noting that "[c]ourts in this district are split as to whether the [Consumer Fraud Act] may apply to consumers who are not citizens of Illinois" and holding that the Act could apply where "the transactions giving rise to the action took place in Illinois"); *MAN Roland, Inc. v. Quantum Color Corp.*, 57 F.Supp.2d 568, 575 (N.D.Ill.1999) (rejecting interpretation of the Act which extends "standing only to consumers who are Illinois residents" and holding that the Act could apply where the nonresident consumer purchased a product "in Illinois from an Illinois corporation"); *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 339 (N.D.Ill.1997) (even under those cases allowing nonresidents to pursue a cause of action under the Act, the non-Illinois residents in this case could not do so because their claims had "little or no connection to Illinois"); *Peters v. Northern Trust Co.*, No. 92 C 1647 (N.D.Ill.1999) (noting split in the district courts based on residency and holding that plaintiffs' consumer fraud claim failed because the

conduct underlying the claims had “no connection to Illinois”).

Additional interpretations of section 1(f) also exist in the district courts. One court has stated that what is important in determining whether a plaintiff may pursue a cause of action under section 1(f) is not the plaintiff’s “residency, but the State of Illinois’ interest in protecting its consumers” (*Ivanhoe Financial, Inc. v. Mortgage Essentials, Inc.*, No. 03 C 6887 (N.D.Ill. (2004))), while another court has referred to section 1(f) as imposing “‘Illinois contact’ requirements” (*Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F.Supp. 869, 878 (N.D.Ill.1990)). Still other permutations can be found in the district courts; this list is not exhaustive.

Like the federal district courts, our appellate court has also divided over the question of how best to interpret section 1(f). In *Oliveira v. Amoco Oil Co.*, 311 Ill.App.3d 886 (2000), *vacated in part & rev’d on other grounds*, 201 Ill.2d 134 (2002), the Fourth District of our appellate court declined to hold that the Act applied to out-of-state consumers. *Oliveira*, 311 Ill.App.3d at 898 citing *Scott v. Association for Childbirth at Home, International*, 88 Ill.2d 279, 288 (1981). The appellate court’s decision in *Oliveira* was subsequently cited by a First District decision in *Prime Leasing, v. Kendig*, 332 Ill.App.3d 300 (2002), where the court stated in *dicta* that “the Act normally does not apply to out-of-state consumers.” *Prime Leasing*, 332 Ill.App.3d at 313.

In the case at bar, the Fifth District concluded, without discussing the statutory language of section 1(f) or any of the federal district court decisions discussing this issue, that non-Illinois consumers are “permitted to pursue an

action under the Act against a resident defendant where the deceptive acts and practices [are] perpetrated in Illinois." 321 Ill.App.3d at 281. More recently, in *Bunting v. Progressive Corp.*, 348 Ill.App.3d 575 (2004), the First District elected to follow the appellate court decision in this case and rejected the defendant's argument that "the Act is inapplicable because plaintiff is a nonresident." *Bunting*, 348 Ill.App.3d at 586.

It is not clear from the plain language of section 1(f) which, if any, of the many interpretations noted above accurately captures the meaning of that provision. Indeed, the wealth of competing interpretations of section 1(f) is a compelling indication of the statute's ambiguity. See, e.g., *Krohe v. City of Bloomington*, 204 Ill.2d 392, 395-96 (2003) ("A statute is ambiguous if it is capable of being understood by reasonably well-informed persons in two or more different ways"). Because the language of section 1(f) is ambiguous, it is appropriate for us to consider other sources, including legislative history, in order to discern the statute's meaning. See, e.g., *People v. Jameson*, 162 Ill.2d 282, 288 (1994).

Although there is not a great deal of legislative history with respect to section 1(f), we do find relevant a statement from Senator Sours, the Senate sponsor of the bill which created a private cause of action under the Act and which added section 1(f). See Pub. Act 78-904, eff. September 21, 1973. Just before the vote in the Senate was taken, Senator Sours made the following remarks:

"Just to conclude briefly Mr. President and Senators, I'd like to just read a couple of excerpts from this bill and . . . the excerpts are very brief to indicate the broad terms of the bill. I'm reading

line 7 on page 2: 'The terms trade and commerce' and that really is what we're talking about. *We're talking about trade and commerce that is not included within the interstate concept.* Means the advertising and how much of that we see offering for sale, sale or distribution of any services and any property tangible or and intangible, real, personal or mixed and every other article, commodity or thing of value wherever it's situated and shall include any trade or commerce, directly or indirectly affecting the people of this State." (Emphasis added.) 78th Ill. Gen. Assem., Senate Proceedings, June 30, 1973, at 268 (statements of Senator Sours).

In addition to Senator Sours' statement, we note the long-standing rule of construction in Illinois which holds that a "statute is without extraterritorial effect unless a clear intent in this respect appears from the express provisions of the statute." *Dur-Ite Co. v. Industrial Comm'n*, 394 Ill. 338, 350 (1946); *Graham v. General U.S. Grant Post No. 2665, V.F.W.*, 43 Ill.2d 1, 6 (1969); see also *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188, 125 L.Ed.2d 128, 155, 113 S. Ct. 2549, 2567 (1993) ("Acts of Congress normally do not have extraterritorial application unless such an intent is clearly manifested"); 73 Am.Jur.2d *Statutes* § 250 (2001). Given the statement of Senator Sours and the rule against giving statutes extraterritorial effect unless an intent to do so is clearly expressed, we conclude that the General Assembly did not intend the Consumer Fraud Act to apply to fraudulent transactions which take place outside Illinois.

Having concluded that the Act does not have extraterritorial effect, the next step in our analysis is to determine whether the transactions at issue in this case took place

outside Illinois. We first observe, however, that it can be difficult to identify the situs of a consumer transaction when, as plaintiffs in this case allege, the transaction is made up of components that occur in more than one state. To solve this problem, courts have often directed their focus to the site of injury or deception – the reason being that, until a deceptive statement has been communicated to a plaintiff and there has been an injury, there is no fraudulent transaction and no cause of action. The Court of Appeals of New York followed this approach in *Goshen v. Mutual Life Insurance Co.*, 98 N.Y.2d 314, 774 N.E.2d 1190 (2002). In that decision, the New York court considered whether “hatching a scheme” or originating a marketing campaign in New York constituted an actionable deceptive act under a consumer fraud statute which limited the definition of trade or commerce to that which occurred in-state. *Goshen*, 98 N.Y.2d at 324, 774 N.E.2d at 1195. The court concluded that it did not. The court explained that “[t]he origin of any advertising or promotional conduct is irrelevant if the deception itself – that is, the advertisement or promotional package – did not result in a transaction in which the consumer was harmed.” *Goshen*, 98 N.Y.2d at 326, 774 N.E.2d at 1196. Because there was no fraudulent transaction until the deception occurred, the location of the deception was the controlling factor. Thus, the court held that “to qualify as a prohibited act under the statute, the deception of a consumer must occur in New York.” *Goshen*, 98 N.Y.2d at 325, 774 N.E.2d at 1195. See also *Graham v. General U.S. Grant Post No. 2665, V.F.W.*, 43 Ill.2d 1, 6 (1969) (no cause of action under Illinois Dram Shop Act where the injury to plaintiff occurred out-of-state).

The position taken by the *Goshen* court is not unreasonable. In a misrepresentation case, there is no fraudulent transaction until the misrepresentation has been communicated. But the *Goshen* court's view of the situs of a consumer transaction is a narrow one. The place of injury or deception is only one of the circumstances that make up a fraudulent transaction and focusing solely on that fact can create questionable results. If, for example, the bulk of the circumstances that make up a fraudulent transaction occur within Illinois, and the only thing that occurs out-of-state is the injury or deception, it seems to make little sense to say that the fraudulent transaction has occurred outside Illinois. Stated otherwise, we believe that there is a broader alternative to the position taken by the *Goshen* court, namely, that a fraudulent transaction may be said to take place within a state if the circumstances relating to the transaction occur primarily and substantially within that state.

The General Assembly has stated that the Consumer Fraud Act "shall be liberally construed to effect" its purposes. 815 ILCS 505/11a (West 1998). Given this fact, we believe that the General Assembly intended the broader understanding of an in-state transaction noted above. Accordingly, we hold that a plaintiff may pursue a private cause of action under the Consumer Fraud Act if the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois. In adopting this holding, we recognize that there is no single formula or bright-line test for determining whether a transaction occurs within this state. Rather, each case must be decided on its own facts. Accordingly, the critical question in this case becomes whether the circumstances relating to

plaintiffs' disputed transactions with State Farm occurred primarily and substantially in Illinois.

2. Whether the Consumer Fraud Act Applies to the Transactions at Issue in This Case

The appellate court below concluded that the Consumer Fraud Act could be applied to the out-of-state plaintiffs in this case. The appellate court explained: "The evidence demonstrates that the deceptive claims practices occurred in Illinois. It was in Illinois that the claims practices were devised and procedures for implementation were prepared for dissemination in other states." 321 Ill.App.3d at 282.

We agree with the appellate court that the place where a company policy is created or where a form document is drafted may be a relevant factor to consider in determining the location of a consumer transaction. However, in this case, it does not follow that because a single factor relating to State Farm's claims practices with its policyholders took place in Illinois, the claims practice itself "occurred in Illinois." In fact, just the opposite is true. The overwhelming majority of circumstances relating to the disputed transactions in this case – State Farm's claims practices – occurred outside of Illinois for the out-of-state plaintiffs.

Plaintiff Michael Avery's transaction with State Farm during the claims process is representative of the situation of the out-of-state plaintiffs. Avery resides in Louisiana, not Illinois. His car was garaged in Louisiana and his accident occurred there as well. Avery's estimate was written in Louisiana and he received his "Quality Replacement Parts" brochure in Louisiana. The alleged

deception in this case – the failure to disclose the inferiority of non-OEM parts – also occurred in Louisiana. The repair of Avery's car took place in Louisiana. Damage to Avery, if any, occurred in Louisiana. Moreover, there is no evidence that Avery ever met or talked to a State Farm employee who works in Illinois. Avery's contact with State Farm was through a Louisiana agent, a Louisiana claims representative, and a Louisiana adjustor. In sum, the overwhelming majority of the circumstances which relate to Avery's and the other out-of-state plaintiffs' claims proceedings – the disputed transactions in this case – occurred outside Illinois. We conclude, therefore, that the out-of-state plaintiffs in this case have no cognizable cause of action under the Consumer Fraud Act.

In support of the appellate court, plaintiffs rely on *Martin v. Heinold Commodities, Inc.*, 117 Ill.2d 67 (1987) (*Martin I*), to which the appellate court cited. In *Martin I*, a plaintiff class consisting of both Illinois and non-Illinois residents brought suit against an Illinois company that had served as broker for the plaintiffs in commodities transactions. The broker relationship had been established by a contract that allegedly contained deceptive statements. This court allowed certification of the plaintiffs' claims under the Illinois Consumer Fraud Act, even with respect to the non-Illinois plaintiffs. *Martin I*, 117 Ill.2d at 80-83.

Martin I is of little help to plaintiffs. In addressing the propriety of the class before it, *Martin I* considered only whether the class comported with the due process principles laid out in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 86 L.Ed.2d 628 (1985). *Martin I*, 117 Ill.2d at 82. *Martin I* did not address the scope of the Consumer Fraud Act as a matter of statutory interpretation; that issue

simply was not presented. See *Nix v. Smith*, 32 Ill.2d 465, 470 (1965) ("A judicial opinion is a response to the issues before the court, and these opinions, like others, must be read in light of the issues that were before the court for determination"). Nevertheless, to the extent that *Martin I* is relevant here, it is distinguishable.

In *Martin I*, this court specifically based its decision on the following facts: (1) the contracts containing the deceptive statements were all executed in Illinois; (2) the defendant's principal place of business was in Illinois; (3) the contract contained express choice-of-law and forum-selection clauses specifying that any litigation would be conducted in Illinois under Illinois law; (4) complaints regarding the defendant's performance were to be directed to its Chicago office; and (5) payments for the defendant's services were to be sent to its Chicago office. Given these circumstances, this court concluded that the Act could apply to the whole class. *Martin I*, 117 Ill.2d at 82-83.

In contrast to *Martin I*, there are virtually no circumstances relating to the disputed claims practices at issue in this case which occurred or existed in Illinois for those plaintiffs who are not Illinois residents. The appellate court's conclusion that a scheme to defraud was "disseminated" from State Farm's headquarters is insufficient. See, e.g., *Rohlfing v. Manor Care, Inc.*, 172 F.R.D. 330, 340 & n. 10 (N.D.Ill.1997) (where the only connection with Illinois is the headquarters of the defendant or the fact that a scheme "emanated" from Illinois, the Consumer Fraud Act "does not apply to the claims of the non-Illinois plaintiffs even under the broad application of the [Act] endorsed by *Martin* and other similar cases").

Based on the foregoing, we conclude that the circuit court erred in certifying a nationwide class that included class members whose claims proceedings took place outside Illinois. Because we have decided the propriety of the certification order on statutory interpretation grounds, we need not consider whether certification of the nationwide class was unconstitutional or violated choice-of-law rules.

The only putative class that can exist in this case under the Consumer Fraud Act is a class consisting of policyholders whose vehicles were assessed and repaired in Illinois. Four of the five named plaintiffs in this case, Avery, Covington, Shadle and Vickers, are not residents of Illinois, the damage to their vehicles did not occur in Illinois, they did not receive their repair estimates in Illinois, and they did not have their cars repaired in Illinois. These individuals have no cause of action under the Act. The only named plaintiff in this case whose vehicle was assessed and repaired in Illinois and, therefore, the only named plaintiff who can serve as a representative plaintiff for the putative Illinois class, is Sam DeFrank. Because a failure of DeFrank's claim would render discussion of class certification issues moot (see, e.g., *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134, 156-57 (2002)), we now turn to the propriety of the judgment in favor of DeFrank.

C. Propriety of Judgment: Named Plaintiff

To succeed in a private cause of action under the Consumer Fraud Act, a plaintiff must prove "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the

occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Oliveira*, 201 Ill.2d at 149. In general, a trial court's decision as to whether these elements have been proven in any case is reviewed under the manifest weight of the evidence standard. *Kirkruff v. Wisegarver*, 297 Ill.App.3d 826, 839 (1998).

State Farm contends that the named plaintiffs, including DeFrank, failed to prove several of the elements required to establish a private cause of action. State Farm also contends that the circuit court held plaintiffs to the wrong burden of proof. We address this issue first.

1. Burden of Proof

The circuit court below held, as a matter of law, that plaintiffs must prove the elements of a private cause of action under section 10a(a) of the Act by a preponderance of the evidence. The appellate court agreed. 321 Ill.App.3d at 291. State Farm contends that these holdings are incorrect and that the proper burden of proof in this case is clear and convincing evidence.

In the ordinary civil case, because there are no sound reasons for favoring one party over another, the party with the burden of persuasion must prove his or her case by a preponderance of the evidence. A proposition proved by a preponderance of the evidence is one that has been found to be more probably true than not true. Occasionally, however, policy considerations require a court to impose a higher standard of proof. In such a case, the party with the burden of persuasion must prove his or her case by clear and convincing evidence. *Bazydlo v. Volant*, 164 Ill.2d 207,

212-13 (1995); see *Arrington v. Walter E. Heller International Corp.*, 30 Ill.App.3d 631, 639-40 (1975).

In the context of common law fraud, the law presumes that transactions are fair and honest; fraud is not presumed. Accordingly, fraud must be proved by clear and convincing evidence. *Racine Fuel Co. v. Rawlins*, 377 Ill. 375, 379-80 (1941); see *Gordon v. Dolin*, 105 Ill.App.3d 319, 324 (1982) (observing that in a common law fraud action, the plaintiff carries "a heavy responsibility").

The Consumer Fraud Act does not expressly provide the standard of proof required to succeed in a private cause of action. However, as noted, the Act is to be liberally construed to effect its purpose, which is to provide broader protection to consumers than an action for common law fraud. Accordingly, based on the liberal intent of the legislature behind the Act, and based on the fact that the Act does not expressly require a greater standard of proof, the appellate court has held that the appropriate standard of proof for a statutory fraud claim is preponderance of the evidence. See *Cuculich v. Thomson Consumer Electronics, Inc.*, 317 Ill.App.3d 709, 717-18 (2000); *Maloolley v. Alice*, 251 Ill.App.3d 51, 56 (1993).

In this case, the appellate court agreed with this reasoning and conclusion. 321 Ill.App.3d at 291. We do likewise and so hold. Cases requiring a clear and convincing standard of proof (see, e.g., *General Motors Acceptance Corp. v. Grissom*, 150 Ill.App.3d 62, 65 (1986); *Munjal v. Baird & Warner, Inc.*, 138 Ill.App.3d 172, 183 (1985)) are overruled on this point.

2. The Deceptive Act or Practice

When State Farm specified a non-OEM part in one of its repairs, it disclosed the use of that part in the policyholder's estimate and "half-sheet." See *Appendix A and Appendix B*. As noted previously, the gravamen of plaintiffs' complaint against State Farm is that this disclosure was inadequate. According to plaintiffs, State Farm should also have disclosed the categorical inferiority of non-OEM parts. Its failure to do so, plaintiffs contend, constituted a deceptive act or practice under the Act.

There are several difficulties with plaintiffs' argument. Recall that plaintiffs do not contend that all non-OEM parts are defective, only that they are all not as good as OEM parts. State Farm knew this fact, plaintiffs allege, and should have disclosed it to all policyholders. But many businesses undoubtedly sell products with the knowledge that those products are not as good as other brands on the market. Under plaintiffs' reasoning, it would appear that to avoid liability under the Act, every knowing sale of a brand of product which is not the top brand would have to carry a disclaimer: "Notice, our brand is not, on the whole, as good as our competitor's." Thus, adopting plaintiffs' argument would appear to work a significant expansion of liability under the Act.

Further, and of equal importance, we note that the disclosure provided by State Farm was required by, and complied with, state law.

Section 155.29 of the Insurance Code provides:

"§ 155.29. (a) Purpose. The purpose of this section is to regulate the use of aftermarket crash parts by requiring disclosure when any use of an aftermarket non-original equipment manufacturer's crash

part is proposed and by requiring that the manufacturers of such aftermarket crash parts be identified.

(b) Definitions. * * *

* * *

(c) Identification. Any aftermarket crash part supplied by a non-original equipment manufacturer for use in this State after the effective date of this Act shall have affixed thereto or inscribed thereon the logo or name of its manufacturer. The manufacturer's logo or name shall be visible after installation whenever practicable.

(d) Disclosure. No insurer shall specify the use of non-OEM aftermarket crash parts in the repair of an insured's motor vehicle, nor shall any repair facility or installer use non-OEM aftermarket crash parts to repair a vehicle unless the customer is advised of that fact in writing. In all instances where an insurer intends that non-OEM aftermarket crash parts be used in the repair of a motor vehicle, the insurer shall provide the customer with the following information:

(1) a written estimate that clearly identifies each non-OEM aftermarket crash part; and

(2) a disclosure settlement incorporated into or attached to the estimate that reads as follows: "This estimate has been prepared based on the use of crash parts supplied by a source other than the manufacturer of your motor vehicle. Warranties applicable to these replacements parts are provided by the manufacturer or distributor of these

parts rather than the manufacturer of your vehicle.’” 215 ILCS 5/155.29 (West 1998).

State Farm’s compliance with section 155.29 of the Insurance Code raises an important issue. Like most state consumer fraud statutes, the Illinois Consumer Fraud Act exempts from its coverage practices or transactions which are permitted by other laws. Section 10b(1) of the Consumer Fraud Act provides:

“Nothing in this Act shall apply to any of the following:

(1) Actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States.”
815 ILCS 505/10b(1) (West 1998).

Interpreting Illinois decisions which have addressed this provision, the Seventh Circuit has stated:

“Taken together, the [Illinois] cases stand for the proposition that the state [Consumer Fraud Act] will not impose higher disclosure requirements on parties than those that are sufficient to satisfy federal regulations. If the parties are doing something specifically authorized by federal law, section 10b(1) will protect them from liability under the [Act]. On the other hand, the [Consumer Fraud Act] exemption is not available for statements that manage to be in technical compliance with federal regulations, but which are so misleading or deceptive in context that federal law itself might not regard them as adequate.” (Emphasis omitted.) *Bober v. Glaxo Wellcome PLC*, 246 F.3d 934, 941 (7th Cir. 2001).

The Insurance Code does not require insurance companies to disclose that non-OEM parts are “categorically inferior” to OEM parts. Indeed, contrary to the findings of the circuit court below, it would appear that by allowing and regulating the use of non-OEM parts in Illinois, the General Assembly has made the policy determination that at least some number of non-OEM parts are *not* inferior to OEM parts. Otherwise, the General Assembly’s decision to permit their use makes little sense. See *Snell v. Geico Corp.*, No. Civ. 202160, slip op. at 9 n.2 (Md. Cir. Ct. August 14, 2001) (reasoning that, if state insurance commissioners would not sanction the use of *inferior* non-OEM parts, and if, nevertheless, they sanctioned the use of non-OEM parts in some instances, “these insurance commissioners must have determined that non-OEM parts are not *categorically* and *universally* inferior” (emphases in original)).

In light of section 155.29 of the Insurance Code, and section 10b(1) of the Act, we believe that there is a serious question as to whether State Farm’s failure to disclose to its policyholders that non-OEM parts are not as good as OEM parts can be considered a deceptive act or practice. However, State Farm does not press this issue and we need not explore it further. We express no opinion as to the proper scope of section 10b(1) of the Act or the correctness of the *Bober* decision, or whether State Farm committed a deceptive act or practice within the meaning of the Consumer Fraud Act. Instead, we conclude that DeFrank’s claim fails because he suffered no actual damage, as required under the Act, and because he failed to establish proximate causation.

3. Actual Damage

The most striking deficiency in DeFrank's claim that State Farm violated the Consumer Fraud Act is his lack of actual damage. In order to sustain a private cause of action under the Act, a plaintiff must prove that he or she suffered "actual damage as a result of a violation of [the] Act." 815 ILCS 505/10a(a) (West 1996); *Oliveira*, 201 Ill.2d at 148-49.¹¹ In this case, DeFrank did not suffer any damage as a result of State Farm's specification or use of non-OEM parts.

The incident that gave rise to DeFrank's claim occurred on November 1, 1997, when his 1992 Chevrolet pickup truck was damaged in an accident. DeFrank testified that State Farm's estimate for repair of his truck included non-OEM parts and that these non-OEM parts were used in the truck's repair. DeFrank stated that several months later he sold his truck to his brother-in-law for \$11,000, slightly below the "blue book" value of \$11,400, in what DeFrank himself agreed was an "arm's length" transaction. DeFrank was asked by plaintiffs' counsel at trial whether the non-OEM parts on the truck were a factor in the sale. His answer was "No." On cross-examination, this point was made clear:

"Q. [Counsel for State Farm] And there were no discounts in the price that you sold the truck for to your brother-in-law on account of the fact that

¹¹ The word "actual" was added to section 10a(a) by Public Act 89-144, effective January 1, 1996. Without expressing any opinion on the significance of this change, we note that DeFrank's accident occurred in 1997 and, thus, is covered by this language. See *Greisz v. Household Bank (Illinois)*, 8 F.Supp.2d 1031, 1043 (N.D.Ill.1998) (discussing the change in language).

there were non-OEM parts on the car; is that right?

A. [DeFrank] Right.

Q. Is that correct?

A. Yes."

The language of the Consumer Fraud Act is plain. A plaintiff must prove "actual damage" before he or she can recover under the Act. That did not occur here. DeFrank's own testimony establishes that, when he sold his truck to his brother-in-law, he received the same value for the truck that he would have received if only OEM parts had been used in the repair. It simply made no difference that non-OEM parts were present on the truck. Clearly, DeFrank suffered no "actual damage" as a result of State Farm's specification or use of non-OEM parts and, therefore, he cannot recover under the Act.¹²

The appellate court offered no explanation as to how DeFrank, or any other members of the class, suffered "actual damage" within the meaning of the Consumer Fraud Act, while the circuit court offered only a brief statement on the issue. In a single sentence in its judgment order, the circuit court held that plaintiffs' damages under the consumer fraud count were defined in the same manner as they were under the breach of contract count. Thus, according to the circuit court, actual damages were

¹² DeFrank was not the only named plaintiff for whom the use of non-OEM parts made no difference. State Farm paid plaintiff Carly Vickers "book value" for her car after it was totaled in an accident. In her trial testimony, Vickers stated that, as far as she knew, State Farm did not value the car any less because of the non-OEM parts which were on it.

defined as "specification" and "installation" damages. As with the breach of contract count, "specification" damages occurred at the moment State Farm specified a non-OEM part in a policyholder's repair estimate. "Installation" damages consisted of the cost of replacing non-OEM parts with OEM parts on those vehicles which had actually had non-OEM parts installed. Neither of these theories establishes that DeFrank suffered any damage under the Consumer Fraud Act.

First, DeFrank no longer owns his truck, which was sold for fair market value. Accordingly, as plaintiffs' own damages expert, Dr. Mathur, acknowledged at trial, DeFrank is not entitled to installation damages.

Second, reliance on specification damages is entirely inappropriate for DeFrank's consumer fraud claim. As explained in our discussion of plaintiffs' breach of contract count, specification damages are not, in fact, real or measurable damages and, hence, in no way constitute "actual damage" within the meaning of the Act. In addition, with respect to DeFrank's consumer fraud claim, specification damages make no chronological sense. Under plaintiffs' theory of specification damages, the damage done to DeFrank occurred at the moment State Farm specified non-OEM parts in its repair estimate. However, the alleged misrepresentations made to DeFrank, and the alleged failure to disclose the categorical inferiority of non-OEM parts, occurred *after* specification, when DeFrank was handed his estimate and the brochure. Actual damage cannot be the result of omissions and misrepresentations which are made after the damage has already occurred. *Connick v. Suzuki Motor Co.*, 174 Ill.2d 482, 502 (1996).

Perhaps aware of the temporal problems that arise when actual damage is defined as the mere specification of non-OEM parts, the appellate court offered an additional explanation of damage which, at least implicitly, resolves this problem. The appellate court stated:

"There is evidence that State Farm's material misrepresentations led numerous class members to blindly accept the non-OEM parts specified (*i.e.*, without knowledge of the inferior condition of those parts)." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23).¹³

Notice what the appellate court has done here. With this sentence, it is no longer the case that damage occurred when non-OEM parts were *specified*. Instead, the damage occurred when non-OEM parts were *accepted*. This is not the theory of damages which was adopted by the circuit court, nor is it the theory advanced by plaintiffs.

The new theory of damages offered by the appellate court has the virtue of making chronological sense because it places the deception before the damage. Applying this reasoning to DeFrank's case, DeFrank would first have received an estimate and a brochure, and the omissions in those documents would then have deceived him into "blindly accept[ing] the non-OEM parts specified without knowledge of their categorical inferiority." However, this theory still does not explain how DeFrank was actually damaged within the meaning of the Consumer Fraud Act.

¹³ The appellate court did not identify what percentage of the class it was referring to when it used the term "numerous." Nor did the court explain why, if only "numerous class members" were damaged, State Farm was held liable for damages to the entire class.

As noted above, even though DeFrank accepted the non-OEM parts that were placed on his truck, he suffered no damage whatsoever as a result of that acceptance. Accordingly, because State Farm's specification or use of non-OEM parts did not cause DeFrank any actual damage, his consumer fraud claim is without merit.

4. Proximate Cause – Actual Deception

The appellate court's conclusion that State Farm's representations "led numerous class members to blindly accept the non-OEM parts specified * * * without knowledge of their categorical inferiority" cannot apply in DeFrank's case for an additional reason – lack of proximate causation.

In a series of three cases, this court has held that in a cause of action for fraudulent misrepresentation brought under the Consumer Fraud Act, a plaintiff must prove that he or she was actually deceived by the misrepresentation in order to establish the element of proximate causation. The three cases are *Zekman v. Direct American Marketers, Inc.*, 182 Ill.2d 359 (1998), *Oliveira v. Amoco Oil Co.*, 201 Ill.2d 134 (2002), and *Shannon v. Boise Cascade Corp.*, 208 Ill.2d 517 (2004).

In the case at bar, State Farm argues that under *Zekman* and *Oliveira* (*Shannon* was not yet filed at the time of briefing and argument), DeFrank's consumer fraud claim must fail because he has not established that he was actually deceived by any omissions or representations made by State Farm. Plaintiffs, in response, argue that *Zekman* and *Oliveira* are distinguishable from the present case because those cases involved deceptive advertising and alleged fraud on the market, *i.e.*, misrepresentations

made to the public at large, rather than misrepresentations "directed specifically at plaintiffs as policyholders." According to plaintiffs, a covenant of good faith is implied in every contract and the presence of such a covenant here gave rise "to a relationship quite different than the attenuated nexus between a merchant and prospective consumer in an impersonal deceptive advertising campaign."

Though not entirely clear, it appears that plaintiffs are arguing in favor of a different definition of causation for those individuals who have contracts with a consumer fraud defendant versus those who do not. To the extent that this is plaintiffs' argument, we reject it. Further, and more importantly, we reject plaintiffs' attempt to distinguish *Zekman* and *Oliveira*. The critical point of these cases is not that they involved advertising. Rather, the important legal principle established in *Zekman*, *Oliveira* and *Shannon* is that in a case alleging deception under the Act, it is not possible for a plaintiff to establish proximate causation unless the plaintiff can show that he or she was, "in some manner, deceived" by the misrepresentation. *Oliveira*, 201 Ill.2d at 155. Proximate causation is an element of all private causes of action under the Act. Thus, DeFrank must establish that he was deceived by State Farm's representations or omissions in order to prove his claim.

The circuit court did not discuss deception in its judgment order and the court's entire analysis of proximate causation is contained in its finding that "as a direct and proximate result of State Farm's violation of the Consumer Fraud Act, the plaintiffs were injured and incurred actual damages." The appellate court did address deception, although in a summary fashion. The court

stated, without further explanation, that “[t]here is overwhelming evidence of State Farm’s calculated deception of its policyholders.” 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23).

The notion that DeFrank was deceived by the omissions or representations in his estimate and brochure into accepting non-OEM parts is categorically refuted by the record. At trial, DeFrank gave the following testimony:

“Q. [Plaintiffs’ counsel] I may have asked you this. Did you report the collision to State Farm?

A. [DeFrank] Yes.

Q. Did you report it promptly?

A. Yes.

Q. Okay. Tell the jury what happened, Sam, after you called State Farm.

A. They made an appointment with me to take my truck to the claims center which is out by the airport.

Q. Okay.

A. And which I did on that particular day.

Q. Okay. Was it on November the 5th that you did that?

A. Yes, sir.

Q. Okay. Tell the jury what happened on November the 5th when you went out there.

A. Well, I took my truck to the claims center. I pulled it inside. And the fellow there that – he started looking it over. And I said, Oh, yeah. By

the way, I said, I want all GM parts on that truck.

Q. Why did you happen to bring that up?

A. Seeing commercials on TV where they say, you know, keep your GM car all GM.

Q. Okay. That was all you knew about it?

A. That was all I knew about it at the time.

Q. What did he tell you?

A. He said, We will talk about that later.

Q. Did that indicate anything – what did you think?

A. I figured something was up.

Q. Okay. Did you talk to a man named – a claim representative or somebody named Richard Hill?

A. Yes, sir.

Q. Okay. When did you do that?

A. When?

Q. Yeah. When did you do that? Was that while the truck –

A. While this other fellow was looking at my truck and, I guess, writing the estimate on that, we went into his office.

Q. Richard Hill?

A. Richard Hill's office.

Q. Okay. And did what [sic] Mr. Hill give you?

A. We talked for a little bit, and then he handed me a little brochure from State Farm.

Q. Okay.

A. That stated their policy.

Q. Okay. Did it tell you that – state their policy about what?

A. If they used non-OEM parts on your vehicle.

Q. That they would use non-OEM?

A. That they stand behind it. Yeah.

Q. What was your reaction to finding out that they were going to use non-OEM parts on your vehicle?

A. I was very upset.

Q. Did you complain?

A. Did I to Mr. Hill at that time? Yes.

Q. And what was Mr. Hill's response to you?

A. He just promised me that – or basically said that there was really – that's how they do it, and that they stand behind their non-OEM parts. If I had any trouble they would take care of me."

DeFrank's testimony makes it abundantly clear that he was not deceived by anything State Farm said, or did not say, regarding the quality of non-OEM parts. Even before he spoke to the State Farm adjuster, DeFrank believed, in his own mind, that non-OEM parts were not as good as OEM parts. Otherwise, he would not have insisted that GM parts be installed on his truck. Further, DeFrank would not have become, in his words, "very upset" upon learning that non-OEM parts were to be used on his truck unless he believed that non-OEM parts were not as good as OEM parts.

Neither the appellate court nor the circuit court addressed DeFrank's testimony or explained how, in light of that testimony, it can be said that he "blindly" accepted the non-OEM parts "without knowledge of their categorical inferiority." 321 Ill.App.3d 269 (quote contained in a portion of the opinion unpublished under Supreme Court Rule 23). DeFrank plainly was not deceived by State Farm's estimate or "Quality Replacement Parts" brochure. Because he was not deceived by State Farm, DeFrank failed to establish the proximate causation necessary to recover under the Consumer Fraud Act.

In light of the above, it is clear that DeFrank suffered no actual damage, and that he failed to establish proximate causation. For these reasons, DeFrank failed to prove a private cause of action under the Consumer Fraud Act. Because DeFrank, as the representative plaintiff, has not proven his claim for consumer fraud, there can be no Illinois class for plaintiffs' consumer fraud count. See, *e.g.*, *Oliveira*, 201 Ill.2d at 156-57; *Charles Hester Enterprises, Inc. v. Illinois Founders Insurance Co.*, 114 Ill.2d 278, 294-95 (1986). Therefore, we reverse the judgments of the circuit and appellate courts in favor of plaintiffs on the consumer fraud count.

D. Other Issues

In light of our disposition of plaintiffs' consumer fraud claim, we need not reach other issues raised by State Farm in relation to that claim, including the propriety of the circuit court's punitive damages award.

III. Equitable and Declaratory Relief

In count III of their third amended complaint, plaintiffs sought a declaration of rights and a permanent injunction that would, *inter alia*, prohibit State Farm from representing "that non-OEM crash parts are of 'like kind and quality' to OEM crash parts" or that non-OEM crash parts can "restore a vehicle to its pre-loss condition." The circuit court granted plaintiffs declaratory relief. The court entered a declaration which stated, in essence, that State Farm's contractual obligation was the same with respect to each member of the class, regardless of variations in policy language and state regulations. However, the court declined to award plaintiffs injunctive relief, finding that money damages constituted an adequate remedy at law.

In light of our disposition of plaintiffs' claims for breach of contract and statutory consumer fraud, we affirm the circuit court's denial of equitable relief. We reverse the circuit court's granting of declaratory relief.

CONCLUSION

For the foregoing reasons, that portion of the circuit court's judgment which denied plaintiffs' request for equitable relief is affirmed. All other portions of the circuit court's judgment are reversed. Those portions of the appellate court judgment which affirmed the denial of equitable relief and which reversed the circuit court's award of disgorgement damages are affirmed. All other portions of the appellate court's judgment are reversed.

*Appellate court judgment affirmed in part
and reversed in part;*

*circuit court judgment affirmed in part
and reversed in part.*

JUSTICE THOMAS took no part in the consideration or decision of this case.

JUSTICE FREEMAN, concurring in part and dissenting in part:

I agree with my colleagues with respect to some, but not all, of the issues raised in this appeal. Apart from my disagreement on these legal matters, I am troubled by the tone and tenor of today's opinion. I, therefore, write separately to explain my views.

I. BREACH OF CONTRACT

The court reverses the jury verdict in favor of the plaintiff class outright, based on several different rationales. I agree with two major points. First, I concur in the judgment that the nationwide class certification cannot stand. While I disagree with the court's analysis, I believe its conclusion is correct. Further, although the court rightly concludes that the "specification" damages have no basis in law, thus necessitating reversal, I cannot completely join in this portion of the court's opinion because of some unnecessary *dicta*.

Notwithstanding the above, I respectfully disagree with the remainder of the court's conclusions on the breach of contract claim, and dissent therefrom. As I will explain, the court errs in its conclusion that plaintiffs cannot prove a breach of any of the various insurance policies in effect during the class period. Moreover, I do not believe that the jury engaged in improper speculation in

awarding installation damages, such as would necessitate this court stepping in and overruling the jury verdict.

A. Nationwide Certification

The court concludes that nationwide certification was erroneous because the various contracts State Farm uses in different states cannot all be interpreted as promising the same thing. Although I agree with the ultimate result reached by my colleagues – I, too, would find that the circuit court erred in certifying the nationwide class – I disagree with the court’s reasoning.

As an initial matter, the court’s analysis with respect to this issue is plagued by inconsistencies. For example, the court criticizes the circuit court’s conclusion that there is a unitary contractual promise, noting that the various contracts contain different language and that there is no evidence to support the conclusion that the language is irrelevant to determining State Farm’s obligations to its insureds. See slip op. at 22-23. The court specifically holds that the “like kind and quality” policy form and the “pre-loss condition” form “are *not* the same.” (Emphasis in original.) Slip op. at 19. But later, the court inexplicably accepts *State Farm’s* argument that “[t]he term ‘like kind and quality,’ as used in the relevant policies, meant ‘sufficient to restore a vehicle to its pre-loss condition.’” Slip op. at 31. In other words, despite what the court said earlier, it ultimately concludes that the promises in the two contracts *are* the same. If the promises are the same, then any differences between the forms are irrelevant.

In another example of inconsistency, the court states that the circuit court should have ruled before trial on the issue of whether State Farm’s various contract forms had

a unitary promise. Slip op. at 17. However, when it comes to reviewing the lower courts' rulings, the court holds that "there is simply no *evidentiary support* for the lower courts' conclusion that" there is a unitary promise. (Emphasis added.) Slip op. at 23. The evidentiary support the court considers but finds wanting consists, of course, of information adduced at trial. See slip op. at 21-23. This is clearly inconsistent with the earlier statement that the circuit court ought to have decided the issue before trial began, in light of the fact that the court is – quite properly, in my mind – willing to entertain the possibility that evidence adduced at trial could demonstrate that State Farm had a common obligation to all of its policyholders, regardless of variations in the contracts State Farm drafted.

Moreover, the court's rejection of the evidence adduced at trial – specifically, the testimony of Don Porter – cannot withstand scrutiny. First, I note that the court characterizes Porter as "a State Farm property consultant in auto general claims." Slip op. at 10. This description connotes that Porter is the equivalent of a lower level employee. In reality, Porter, a State Farm witness, worked at the State Farm home office in Bloomington as one of only 19 State Farm "property consultants" in the entire nation. At the time of trial, he had been a State Farm employee for 21 years. Porter specifically testified that he was "here to testify to what we do as an organization and what I know that my comrades do when we talk about the use of these parts."

Porter testified, as the court admits, that State Farm had a uniform nationwide practice: "restoring the vehicle to its pre-loss condition." Slip op. at 10. The court, however, determines that it may ignore this testimony because

Porter did not specifically refer to each and every form of contract which State Farm used. I do not believe that the court is respecting the standard of review. Had Porter testified that he arranged his bookshelves in alphabetical order by title, we would not refuse to accord this testimony weight because he did not *specifically* testify that he placed *Moby Dick* before *Wuthering Heights*. Porter was no neophyte, and he was testifying to the practices of State Farm "as an organization." His testimony cannot be brushed away on the basis that he might not have been talking about State Farm as a whole.

The court also interprets Porter's testimony in the light least favorable to the result reached by the circuit court, stating that his general testimony regarding State Farm's practices related only to State Farm's "philosophy," and not its contractual obligations. In other words, the court overrules the circuit court because although State Farm might have had a nationwide "philosophy," its various policies might have promised less - *i.e.*, State Farm might as a matter of "philosophy" give its policy-holders *more* than the benefits for which they have paid. Although it might make a nice sound bite for State Farm's advertisements, this is simply conjecture, not a valid basis for overruling the circuit court. We must defer to the circuit court's interpretation of testimony unless it is clearly erroneous. That standard clearly has not been reached here. At best, the court is suggesting another *possible* interpretation of the testimony at issue and substituting its judgment for the circuit court's. This is not a reviewing court's role. Porter, during his testimony, made a general, categorical statement that State Farm had an overarching consistent obligation. As the court admits, Porter knew that State Farm had several differently

worded policies; it is not as if he were unaware that State Farm chose to use different language in its policies in different states. Nevertheless, he testified that its obligation was everywhere the same.

The court also makes much of Porter's numerous self-serving statements that State Farm's only intent was to restore its insureds' vehicles to their "pre-loss condition." (Indeed, Porter repeated this phrase no less than 26 times during the course of his testimony.) But sometimes, another answer slipped through. For instance, when asked whether State Farm treated all insureds "equally with respect to specifying non-OEM crash parts," Porter testified, "In my experience, we do. *It doesn't make any difference the age of the vehicle, the type of the vehicle.*" (Emphasis added.) This cuts against the court's argument that State Farm's obligation depends on the preloss condition of every individual vehicle, as a vehicle's age is a component of its preloss condition. At another point, counsel for State Farm asked Porter to supply his definition of "the term 'non-OEM part.' " He responded:

"Well, a non-OEM part to me is a part that's made by other than the original manufacturer. And, you know, but it simply to me, is you buy a part from Ford and if the Ford fender was made by Ford, but you can buy that fender that's - that's originally produced by Ford by another manufacturing firm that has produced the same type of fender or fenders *as good as the fender that was the OEM fender.*" (Emphasis added.)

Here Porter clearly testified that non-OEM parts had to be as good as OEM parts.

On cross-examination, Porter was asked about a confidential internal State Farm memorandum, titled

General Claims Memorandum (GCM) #430 (I will return to this document later). Porter admitted that this document required that non-OEM parts "must be of OEM quality." Plaintiffs' counsel subsequently posed the following question to Porter, and received the following response:

"Q. Yes, sir. Now, is there a guarantee to – anywhere else other than this general claims memo that guarantees that these parts will be made out of the same construction and have the same structural integrity as the OEM parts?

A. You know, sir, I would have to say that, yes, *it does* after all *because* it says quality replacement part, and *when we say quality replacement part, we mean those parts that are as good as the parts that were on the vehicle at the time of the loss.*" (Emphases added.)

Porter here made clear that the term "quality replacement part," which meant "parts that are as good as the parts that were on the vehicle at the time of the loss," was a guarantee of OEM quality. Thus, here, Porter equated the guarantee to restore the vehicle to preloss condition with a guarantee of OEM-quality replacement parts. This telling admission wholly undermines the court's theory that preloss condition destroys commonality, because if preloss condition means OEM quality, then a vehicle cannot be restored to preloss condition with a part which falls short of OEM quality, and thus individual examinations of plaintiffs' vehicles is not necessary if, as the jury concluded, all non-OEM parts are of lesser quality than OEM parts.¹⁴

¹⁴ On this topic I note that the court has accepted State Farm's argument that its contractual guarantees to restore vehicles to their "pre-loss condition" and to perform repairs with parts of "like kind and
(Continued on following page)

The jury was entitled to believe Porter's admissions in plaintiffs' favor over his constant repetition of a term favoring State Farm, his long-term employer. The court's proffered reasons for disregarding Porter's testimony are simply untenable.

The court's treatment of Porter's testimony, moreover, is not an isolated event. I am troubled by the court's consideration – or more appropriately its lack of consideration – of the evidence adduced at trial. This case comes before this court on appeal from a trial which lasted more than seven weeks – 50 days elapsed between opening statements on August 16, 1999, and the jury's October 4 verdict. Over the course of the trial, 81 witnesses testified, with the circuit court admitting into evidence well over 200 exhibits. Before the case even went to trial, there were over two years of pretrial proceedings between the filing of plaintiffs' original class action complaint in July 1997 and the August 1999 beginning of trial. The common law record alone runs to more than 30,000 pages of filings. And yet, in an 81-page opinion, the court devotes *less than two full pages* to its initial recitation of the facts. It concerns me, as it ought to concern anyone, to see that the actual evidence adduced in this case is given such short shrift.

As I stated at the outset of this separate opinion, however, I do ultimately agree with my colleagues that the nationwide class cannot stand. Initially, I believe that the

quality" may be defined in terms of each other. See 216 Ill.2d at 143-44, 296 Ill.Dec. at 476-77, 835 N.E.2d at 829-30. If the promises are fungible, as the court admits, then clearly plaintiffs could show that State Farm breached its promise to restore their vehicles to preloss condition by showing that State Farm was not using parts of "like kind and quality."

circuit court abused its discretion in applying Illinois law to the contracts between State Farm and non-Illinois residents. Illinois follows the Restatement (Second) of Conflict of Laws in making choice-of-law decisions. *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill.2d 560, 568 (2000). The Restatement provides that when the parties have not made an effective choice of law, the factors of possible relevance to choice of law in breach of contract cases are

- “(a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties,”

which are to be “evaluated according to their relative importance with respect to the particular issue.” Restatement (Second) of Conflict of Laws § 188, at 575 (1971). In the context of insurance contracts,

“[T]he rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship * * * to the transaction and the parties, in which event the local law of the other state will be applied.” Restatement (Second) of Conflict of Laws § 193, at 610 (1971).

Accord *Westchester Fire Insurance Co. v. G. Heileman Brewing Co.*, 321 Ill.App.3d 622, 630-31 (2000). With respect to automobile insurance contracts, the "principal location of the insured risk" is that location in which the vehicle is to be garaged during most of the insurance policy's term. Restatement (Second) of Conflict of Laws § 193, Comment *b*, at 611 (1971).

Of the above factors, the only one which would appear to militate in favor of applying Illinois law to the out-of-state contracts is the fact that State Farm is an Illinois resident. The most important factor, the location of the insured risks – the insureds' vehicles – would cut against application of Illinois law. The contracts would not have been delivered in Illinois. The insureds would not be domiciled in Illinois. And the last act to give rise to a valid contract – either the insureds' signatures or the deposit of checks in the mail – most likely would not have occurred in Illinois. Consideration of the relevant factors would appear to militate strongly against applying Illinois law to the entire multistate class in this case.

Moreover, even if the fact of State Farm's Illinois domicile sufficed to uphold application of Illinois law according to Illinois choice of law principles, doing so would not pass constitutional muster. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 86 L.Ed.2d 628 105 S. Ct. 2965 (1985), the Supreme Court reviewed a class action brought in Kansas against Phillips Petroleum for recovery of interest on royalties in oil and gas contracts. The contracts at issue were entered into in 10 different states. Even though most of the contracts were entered into outside Kansas, the Kansas Supreme Court upheld its trial court's decision to apply Kansas law to the entire action.

The Supreme Court reversed. The Court stated that even in a case where multiple choices of law might be *possible*, the forum court's choice of law had to comply with constitutional guarantees of due process. *Shutts*, 472 U.S. at 822-23, 86 L.Ed.2d at 649, 105 S.Ct. at 2980 ("in many situations a state court may be free to apply one of several choices of law. But the constitutional limitations * * * must be respected even in a nationwide class action"). The Court rejected the rule formulated by the Kansas Supreme Court that "Where a state court determines it has jurisdiction over a nationwide class action and procedural due process guarantees of notice and adequate representation are present, we believe the law of the forum should be applied unless compelling reasons exist for applying a different law." *Shutts*, 472 U.S. at 821, 86 L.Ed.2d at 648, 105 S.Ct. at 2979, quoting *Shutts v. Phillips Petroleum Co.*, 235 Kan. 195, 221-22, 679 P.2d 1159, 1181 (1984). The Court also noted that a plaintiff's choice of the forum state's law – as evinced by having filed the suit there – is of "little relevance." *Shutts*, 472 U.S. at 820, 86 L.Ed.2d at 648 105 S.Ct. at 2979. Rather, the Court held that to apply its own law, the forum state "must have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [the forum state's] law is not arbitrary or unfair." *Shutts*, 472 U.S. at 821-22, 86 L.Ed.2d at 648, 105 S.Ct. at 2979. The Court concluded that, in the case before it, "[g]iven [the forum state's] lack of 'interest' in claims unrelated to that State, and the substantive conflict with jurisdictions such as Texas, we conclude that application of [the forum state's] law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits."

Shutts, 472 U.S. at 822, 86 L.Ed.2d at 648 105 S.Ct. at 2979.

The same shortcomings that caused the Supreme Court to find a constitutional violation in *Shutts* are present in the instant case. As in *Shutts*, there are significant outcome – determinative differences between the law of Illinois and the laws of other states regarding the breach of contract action. For instance, our circuit and appellate courts determined that State Farm's promise to have repairs performed with parts "of like kind and quality" meant "of like kind and quality to OEM parts," a conclusion with which I agree. However, as State Farm observes, courts in other jurisdictions have not so construed the language. See, e.g., *Ray v. Farmers Insurance Exchange*, 200 Cal.App.3d 1411, 1417, 246 Cal.Rptr. 593, 596 (1988) ("‘like kind and quality’ * * * means ‘substantially the same condition [as] before the accident’"), quoting *Owens v. Pyeatt*, 248 Cal.App.2d 840, 849, 57 Cal.Rptr. 100, 107 (1967); *Schwendeman v. USAA Casualty Insurance Co.*, 116 Wash.App. 9, 22-23, 65 P.3d 1, 8 (2003); see also *Berry v. State Farm Mutual Automobile Insurance Co.*, 9 S.W.3d 884, 894-95 (Tex. Civ. App. 2000). Other states have expressly provided by statute or regulation that non-OEM parts may be used in repairs so long as they are the equivalent of the part on the vehicle immediately prior to the accident. See Or.Rev.Stat. § 746.287(2) (1999); Mass. Regs.Code tit. 211, § 133.04(1) (2004); 806 Ky. Admin. Regs. 12:095 (2003). Application of these jurisdictions' laws would change the outcome of the instant case.

It is possible for a forum state to have a sufficient interest in the resolution of the claims of out-of-state litigants as to render the application of the forum state's law neither arbitrary nor fundamentally unfair despite

outcome – determinative differences. *Shutts*, 472 U.S. at 818, 86 L.Ed.2d at 646, 105 S.Ct. at 2977-78. However, I do not believe that Illinois has such an interest in the instant action. It is true that State Farm is an Illinois corporate citizen, and Illinois does have an interest in regulating its conduct. However, Illinois does not have any particularly compelling interest in protecting the rights of the citizens of other states, especially given that there is no indication that the other states are unable or unwilling to vindicate the rights of their citizens within their own court systems, according to their own laws. Moreover, neither State Farm nor any non-Illinois policyholder would appear to have had any reasonable expectation that Illinois law would govern their contractual dispute. See *Shutts*, 472 U.S. at 822, 86 L.Ed.2d at 648-49, 105 S.Ct. at 2979-80, (fairness calculus must take into account the reasonable expectations of parties as to which state's law would control). Thus, I believe that applying Illinois law to the entire nationwide class which the circuit court certified in this case would run afoul of the due process concerns spelled out in *Shutts*, and I would reverse the multistate certification for this reason. See *State ex rel. American Family Mutual Insurance Co. v. Clark*, 106 S.W.3d 483, 486-87 (Mo. 2003).

B. Contract Interpretation

Having determined that the nationwide class cannot stand, the court next examines whether the verdict may be upheld with respect to any subclass. Slip op. at 23. The court concludes that the question must be answered in the negative. The court actually answers this question in two paragraphs, with no analysis nor citation to authority, based on the verdict form. See slip op. at 23-24. This

ought, perhaps, to be the end of the opinion. But, the court quickly turns the reader's eye away from the paucity of its analysis of what is apparently the determinative issue in the case by turning to a lengthy exegesis of the individual policy forms.

Before reviewing the court's conclusion that, as a matter of law, the plaintiffs failed to prove a breach of any promise State Farm made in any of the various policies State Farm drafted, it is helpful to recall the overarching theme of the plaintiffs' complaint. At its heart, plaintiffs' complaint was that State Farm promised policyholders that their vehicles would be repaired with OEM-quality parts, but the non-OEM parts State Farm specified for repairs were simply not as good as OEM parts and that State Farm knew it. State Farm knowingly specified the inferior non-OEM parts, plaintiffs contended, because they were cheaper. These contentions cannot be ignored, when one considers the evidence adduced at trial. Plaintiffs presented to the jury numerous internal State Farm memoranda that detailed problems with non-OEM parts, some of which criticized non-OEM parts as a class. One such memorandum went so far as to state specifically, in contrasting galvanized OEM parts with nongalvanized non-OEM parts, that "we may well say it is like kind and quality, but the bottom line is that it is not the same." Plaintiffs also presented expert testimony to the effect that non-OEM parts were categorically inferior to OEM parts and thus were *never* of like kind and quality. State Farm does not challenge these experts' *bona fides* on review, and thus their conclusions must be accepted. I believe it is important to note that a reviewing court neither can substitute its judgment for that of the trier of fact nor can it set aside a verdict simply because the trier

of fact could have drawn different conclusions from conflicting testimony. *Doser v. Savage Manufacturing & Sales, Inc.*, 142 Ill.2d 176 (1990). Although State Farm presented its own expert witnesses, a "battle of the experts" is a situation in which reviewing courts are especially loathe to second-guess the findings made by the trier of fact. See *In re Glenville*, 139 Ill.2d 242 (1990).

The court avoids discussing the evidence presented by plaintiffs by holding that State Farm never promised any policyholders that repairs would utilize parts of equal quality to OEM parts. Thus, according to my colleagues, it *does not matter* whether State Farm was knowingly repairing its policyholders' vehicles with inferior parts, because State Farm never promised to use noninferior parts. I suggest that the court has perhaps insufficiently considered the policy implications of overturning a billion dollar verdict on the basis that an insurer's knowing usage of inferior parts is "good enough." I am not stating that non-OEM parts are by definition inferior; my point is that plaintiffs alleged, and by its verdict the jury found, that as of now non-OEM parts are not up to the standards of OEM parts – a factual conclusion the court avoids addressing. The quality of non-OEM parts could change in the future, but the court does not dispute that the crash parts State Farm was actually specifying for repairs were inferior to their OEM counterparts.

In addition to being bad policy, the court's conclusion is also based on a flawed analysis of the relevant contractual provisions. In this regard I note a piece of evidence which the court has remarkably determined to be irrelevant. In 1986, State Farm's vice president of claims penned a confidential internal memorandum, known as "General Claims Memorandum #430" (hereinafter GCM

#430). Therein, he discussed the quality of the parts to be used in repairs. He – that is, State Farm’s vice president of claims – specifically distinguished between what was required of “aftermarket” parts and what was required of “salvage” parts. As an aid to understanding the memorandum, I note that it is uncontroverted that “aftermarket” is a synonym for “non-OEM,” and it is also uncontroverted that “salvage” parts are, as the name implies, a lower grade than non-OEM parts. In comparing the two grades of parts, State Farm’s vice president of claims had this to say:

“Aftermarket parts must be of OEM quality; that quality must be guaranteed by the supplier;

Salvage parts must be of equal, or better, quality compared to the parts being replaced.” (Emphases in original.)

Thus State Farm specifically required that non-OEM parts be of equal quality to OEM parts, only holding “salvage” parts to the lesser standard of equivalence to the parts being replaced.

One might think that this would be the end of the matter. A reasonable reader might expect that a reviewing court would affirm the lower court’s conclusion that non-OEM parts had to be of equal quality to OEM parts, given a memorandum by State Farm’s vice president of claims which precisely so stated. The court, however, does not consider whether GCM #430 ought to be treated as a binding admission by State Farm, because the court, in a footnote, concludes that GCM #430 is irrelevant. See slip op. at 29 n.5. Instead, the court performs its own investigation into the policies at issue, ignoring the fact that State Farm has already said that its non-OEM (aftermarket) parts

“must be of OEM quality,” as opposed to salvage parts, a lower grade, which are merely required to be of equal quality “to the parts being replaced.”

Even if the court were correct to so blatantly ignore the evidence, its analysis of the contracts is logically faulty. For instance, in what the court calls “The ‘You Agree’ Policies” (see slip op. at 25 (heading 2)), State Farm promises to restore the insured’s vehicle to its “pre-loss condition.” This particular form of the contract also contains what the court calls the “you agree” language: “You agree with us that such parts may include either parts furnished by the vehicle’s manufacturer or parts from other sources including non-original equipment manufacturers.” (Emphasis in original.) See slip op. at 25.

The court’s defense of this policy form is two-fold, and begins by focusing on the “you agree” language. The court reasons that by agreeing to this language a policyholder has implicitly admitted that there must exist at least some non-OEM parts capable of satisfying State Farm’s promise. The court construes this admission strictly against the policyholder (in startling contrast to the court’s treatment of State Farm’s admission in GCM #430 that non-OEM parts must be of equal quality to OEM parts). See slip op. at 25.

First, one must recall that this is an insurance policy – a classic contract of adhesion. See *Cramer v. Insurance Exchange Agency*, 174 Ill.2d 513, 533 (1996) (Freeman, J., specially concurring) (“It is well established that an insurance contract is one of adhesion”); see also *Williams v. Illinois State Scholarship Comm’n*, 139 Ill.2d 24, 72 (1990) (adhesion contracts are those in which the parties are in a disparate bargaining position, and one party has

no hand in drafting the agreement but, rather, must "take it or leave it" as the other party has drafted). Contractual clauses which are "part of a 'boilerplate' agreement" in a contract of adhesion have their "significance greatly reduced because of the inequality in the parties' bargaining power." *Williams*, 139 Ill.2d at 72. The average person has no ability to bargain over the individual clauses of his or her auto insurance policy. The court ignores this fact, and seriously damages the credibility of its analysis by doing so. The notion that a policyholder has entered into a binding, factual admission simply by purchasing an auto insurance policy would merely be laughable if the court was not seriously suggesting it as a basis for overturning a billion dollar verdict produced by a two-month-long trial in which the evidence supports the conclusion that an insurer knowingly specified inferior crash parts for repairs of its policyholders' vehicles.

More overridingly, however, even ignoring the injustice of strictly construing a contract of adhesion in favor of the drafter, the court's analysis is logically flawed. The "you agree" language is *not* an admission that there exist non-OEM parts which will restore vehicles to their preloss condition. It is merely an agreement that *if* State Farm proposes to perform a repair with a non-OEM part which *is* sufficient to restore a vehicle to its preloss condition, the insured cannot object to the part *simply* because it is non-OEM. But if non-OEM parts are *not* sufficient to restore vehicles to their preloss condition, as plaintiffs have consistently maintained and as the jury by its verdict found, the policyholder cannot be not forced to accept it simply because of the "you agree" language.

The fallacy of the court's position is better viewed when one examines how it would play out in the context of

other policies State Farm could have issued. Suppose, for example, that State Farm knew that all of the major auto manufacturers were considering building plants in a foreign country that I shall designate as Country A. In anticipation of the plants being built and in order to forestall any complaints by policyholders about receiving parts produced in Country A, State Farm amended its policy so as to provide that

"You agree with us that such parts may include parts furnished by the vehicle's manufacturer, including parts manufactured in Country A."

The reasoning employed by the court in the instant case would hold that everyone insured under this policy has entered into a binding admission that there are General Motors parts manufactured in Country A which are of sufficient quality to restore their vehicles to preloss condition. This is logically fallacious. Recall that the policy language in my hypothetical was drafted in *advance* of the plant in Country A being built, and thus at the time it went into use, there did not exist *any* General Motors parts made in Country A. A plain reading of this language is, rather, a concession by the insured that *if* a part manufactured in Country A suffices to restore his vehicle to its preloss condition, he may not reject the part simply *because* of its origin in Country A.

My colleagues might protest that this hypothetical is far-fetched – and it may be – but no more so than the court's tortured reading of language in a contract of adhesion against innocent policyholders in order to avoid having to acknowledge the proofs adduced at trial. The underlying point remains that the language upon which the court relies is *not* an admission by an insured that there exist non-OEM parts which suffice to restore a

vehicle to its preloss condition. It is merely an agreement that *if* there are such parts, the insured may not refuse to accept them *simply* because they are non-OEM parts.

The second stage of the court's defense of this policy form focuses on the fact that State Farm's promise is to restore the insured's vehicle to its "pre-loss condition." The court believes that this policy form is unsuited to be the basis of a class action because to determine whether a vehicle has been restored to its preloss condition requires determination of the condition of each individual policyholder's vehicle before the loss and after repair, and this multitude of individual questions would "overwhelm any question common to the subclass." Slip op. at 26.

However, as I have already noted, State Farm witness Porter testified that the term "quality replacement part," which meant "parts that are as good as the parts that were on the vehicle at the time of the loss," was a guarantee of *OEM quality*. This testimony equates the guarantee to restore the vehicle to preloss condition with a guarantee of OEM-quality replacement parts, which undermines the court's theory that preloss condition destroys commonality. If preloss condition means OEM quality, as Porter's testimony reveals, then a vehicle cannot be restored to preloss condition with a part which falls *short* of OEM quality. Thus if, as the jury concluded, all non-OEM parts are of lesser quality than OEM parts, individual examinations of plaintiffs' vehicles is *not* necessary. State Farm does not argue in its briefs to this court that the circuit court erred in determining that the "pre-loss condition" and "like kind and quality" promises are the same. Indeed, to the contrary, State Farm affirmatively argues that the promises *are* the same, an argument the majority accepts. See slip op. at 30-31.

Accordingly, the court has failed to demonstrate any reason that plaintiffs would be barred from recovering under "The 'You Agree' Policies."

The court's analysis of the "like kind and quality" policies also falls short. Here, the court examines those policies in which State Farm has written that it promises to "pay to repair or replace the property or part with like kind and quality." The court construes this language in the most favorable way possible for State Farm, concluding ultimately that this is an unambiguous promise to restore the vehicle to its preloss condition – a term which appears nowhere in this form of the contract.

The court acknowledges (see slip op. at 27) plaintiffs' argument that "like kind and quality" means of "like kind and quality to OEM parts." This interpretation is well supported by State Farm's own analysis of the standards required of non-OEM parts, in GCM #430:

"Aftermarket parts must be of OEM quality; that quality must be guaranteed by the supplier;

Salvage parts must be of equal, or better, quality compared to the parts being replaced." (Emphases in original.)

I respectfully suggest that this ought to be the end of the matter. Plaintiffs argue that "like kind and quality" means "like kind and quality to OEM parts"; State Farm has admitted in its internal memoranda that this is *precisely* the quality standard it requires of non-OEM parts; case closed.

Instead, the court once again ignores the memorandum by State Farm's vice president of claims and construes the language State Farm drafted in State Farm's

favor, even going so far as to draw inferences advantageous to State Farm. See slip op. at 28-31. In so doing, the court abandons our well-established rule that ambiguities in insurance contracts are to be strictly construed *against* the drafter. See *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill.2d 278, 293 (2001); *American States Insurance Co. v. Koloms*, 177 Ill.2d 473, 479, (1997); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill.2d 90, 108-09 (1992).

The phrase "like kind and quality" is clearly ambiguous. The language itself gives no clue as to whether it means of like kind and quality *to OEM parts* or *to the part which existed on the vehicle immediately prior to the crash*. But instead of construing this phrase against State Farm, as mandated by our precedent, the court bends over backwards to find an interpretation that favors State Farm. For instance, the court reasons that if non-OEM parts *never* satisfied this promise (as plaintiffs have alleged), there would be no need for this "indirect phrasing." Slip op. at 28. In other words, the court finds that the very vagueness of State Farm's contract of adhesion is a point in State Farm's *favor*.

Moreover, the court misses the fundamentally obvious point that State Farm and the plaintiffs *disagreed* as to whether non-OEM parts were of like kind and quality to OEM parts. State Farm, of course, has maintained all along that non-OEM parts are or can be of like kind and quality to OEM parts. Given this professed belief, there was no reason for State Farm to restrict itself only to using OEM parts. The proofs at trial, however, convinced the jury that this was not the case. Essentially, the court is saying that State Farm must not have promised that any

non-OEM parts it used would be of OEM quality *because the plaintiffs argued and proved that State Farm never fulfilled this promise*. This defies reason. We do not automatically adopt a defendant's interpretation of a contract it drafted whenever a plaintiff proves a breach of its interpretation of the contract. To so suggest is absurd.

The court also draws inferences in favor of State Farm from the sentence which follows the "like kind and quality" promise: "If the repair or replacement results in better than like kind and quality, you must pay for the amount of the betterment." Clearly this statement by State Farm in its contract of adhesion is meant to cover State Farm in the unlikely event that a repair left the policyholder better off. But the court argues on State Farm's behalf that the very existence of this statement shows that "like kind and quality" cannot mean "like kind and quality to OEM parts," because if it did, nothing could ever run afoul of the "better than 'like kind and quality'" language. Slip op. at 29. First, this reasoning is faulty in much the same way as the court's reasoning regarding the "you agree" language: State Farm could just as easily have provided that "If the repair or replacement results in your vehicle being able to fly to the moon, you must pay for the value of this ability." That State Farm included self-serving language in a contract of adhesion does not constitute an admission by its policyholders regarding the hypothetical possibility against which State Farm has sought to protect itself.

Moreover, the proofs plaintiffs presented at trial concerned the quality of non-OEM parts during the relevant period. Plaintiffs claimed, and the jury concluded, based on documentary evidence and the testimony of experts whose *bona fides* State Farm does not challenge on appeal, that non-OEM parts were not the equal of OEM

parts. This does not foreclose the possibility that a master craftsman in Zurich might in the future take it upon himself to smith a set of General Motors crash parts out of titanium alloy, to such precise tolerances that the parts were indeed an improvement on OEM parts. More realistically, it is possible that in the future a company could mass produce non-OEM parts which are better than OEM parts. It could happen. But according to the proofs plaintiffs presented at trial, and the verdict the jury returned in plaintiffs' favor, it has not happened yet. State Farm has protected itself against this eventuality by the sentence upon which the court relies. But there is no basis for the court's broad inference from this sentence to support its interpretation of the baseline promise State Farm has made in this version of the policy.

Again, the flaw in the court's reasoning is that it is taking into account plaintiffs' *theory* of the case in evaluating State Farm's contractual *promises*. The court's reasoning runs as follows: if, as plaintiffs contend, no non-OEM parts were of like kind and quality to OEM parts, then there would have been no reason for State Farm to draft the policy in the manner in which plaintiffs suggest they did. The problem with this reasoning is that it was very much in dispute whether non-OEM parts were of like kind and quality to OEM parts. State Farm has consistently maintained and still maintains that they are or can be equivalent, and *State Farm drafted the policy*.

Moreover, as I have already observed, the court ultimately concludes that "like kind and quality" means something which is nowhere found in the language of this policy: it means, just as State Farm argues, "'sufficient to restore a vehicle to its pre-loss condition.'" Slip op. at 30-31. There are a number of difficulties with this conclusion.

First, it contravenes the rule that ambiguous language in an insurance contract is to be strictly construed against the insurer. Clearly the court finds the “like kind and quality” language ambiguous, given that the court ultimately finds that it has a meaning contained nowhere in the contract. Given that it is ambiguous, there is no question that it ought to be construed against State Farm. *Eljer Manufacturing*, 197 Ill.2d at 293; *Koloms*, 177 Ill.2d at 479; *Outboard Marine*, 154 Ill.2d at 108-09.

A second problem with the court’s conclusion is that in order to reach it, the court ignores State Farm’s own admissions that non-OEM parts “must be of OEM quality.” The court’s willful blindness to GCM #430 is truly troubling. It is, of course, possible for reasonable minds to differ as to the weight to accord a particular piece of evidence. But to act as though a document on the precise issue at hand, penned by State Farm’s vice president of claims, does not even *exist* does a disservice not only to the parties but also to the credibility of this court. The court suggests that GCM #430 is irrelevant because it is not contained within the four corners of the policy and the court has not *explicitly* found that the “like kind and quality” language is ambiguous. See slip op. at 29 n.5. This misses the mark. As I have already observed, the meaning the court ultimately ascribes to the phrase – “sufficient to restore a vehicle to its pre-loss condition” – is *itself* not found within the four corners of the document. It can only further erode the public’s trust in the judiciary to reverse a verdict of this size, ignoring relevant evidence precisely on point, because the court claims it is *unambiguous* – clear, beyond any doubt – that State Farm’s promise to “repair or replace the property or part with like kind and quality” means “with a part equally bad to whatever part was on

the vehicle just before the accident" and *cannot possibly* mean "like kind and quality to OEM parts." There is no defensible basis for this conclusion and there is a host of evidence to the contrary, including not only Porter's testimony and the text of GCM #430, but also extensive testimony by State Farm witnesses that repairs with non-OEM parts would never compromise the safety of the vehicle. If State Farm may utilize replacement parts no better than the parts which happened to be on the vehicle preaccident, however old or faulty, as the court concludes, a vehicle could very well have safety issues after repair. If the court is looking outside the document to understand the meaning of the phrase, and there is no question that it is, then the court is *treating* the phrase as ambiguous, regardless of whether my colleagues are forthright enough to so admit.

Moreover, GCM #430 itself shows that the court's analysis of the contract is wrong – not only is the phrase ambiguous, but the court has actually interpreted it incorrectly. GCM #430 *directly* contradicts the court's pro-State Farm interpretation of the ambiguous phrase in State Farm's insurance policy. Not only did the vice president of claims specify that aftermarket parts had to be "of OEM quality," he also specified that the lesser standard of equality to "the parts being replaced" – *i.e.*, preloss condition – was a standard applicable only to "salvage parts." How the court can square its interpretation of "like kind and quality" with this evidence is beyond me. Apparently, given the court's deafening silence on the matter, it is beyond the court as well.

The court errs in construing the ambiguous language "like kind and quality" in favor of State Farm, in terms which appear only in other versions of the policy. Doing so

violates the rule that ambiguous terms in insurance policies are strictly construed against the drafter. Indeed, three out of the four members of today's majority have authored opinions which have explicitly endorsed this long-standing rule of construction of insurance contracts, and the fourth member has recently concurred in an opinion in which the rule was applied. See *Eljer Manufacturing*, 197 Ill.2d at 293 (Justice McMorrow, writing for the court, acknowledging that "if the language of the policy is susceptible to more than one meaning, it is considered ambiguous and will be construed strictly against the insurer who drafted the policy and in favor of the insured"); *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill.2d 141, 153 (2004) (Justice Garman, writing for the court, acknowledging that "if the words used in the policy are reasonably susceptible to more than one meaning, they are ambiguous and will be strictly construed against the drafter"); *Gillen v. State Farm Mutual Automobile Insurance Co.*, 215 Ill.2d 381, 393 (2005) (Justice Fitzgerald, writing for a unanimous court, acknowledging that "[i]f the policy language is susceptible to more than one reasonable meaning, it is considered ambiguous and will be construed against the insurer"). This construction also contradicts the court's own statements that "There is nothing to support the conclusion that [linguistic differences] are irrelevant and that all of State Farm's policy variations therefore are susceptible of the same contractual interpretation" (slip op. at 22-23) and that the "like kind and quality" policy form and the "pre-loss condition" form "are *not* the same." (Emphasis in original.) Slip op. at 19. The court also ignores State Farm's own interpretation of its obligations in GCM #430, a document by a State Farm vice president which directly contradicts State Farm's position and the court's conclusion regarding what

is required of non-OEM (aftermarket) parts. The court's conclusion that in order to be "like kind and quality," non-OEM parts need merely to be sufficient to put the car in preloss condition erases the distinction *drawn by State Farm* in GCM #430 between non-OEM parts and salvage parts.

Because the reasoning regarding the "like kind and quality" form of contract is erroneous, there is no reason that plaintiffs could not recover under this form of the contract as well as the "pre-loss condition" form of contract, as I previously demonstrated.

Unlike my colleagues, I would construe the ambiguous terms in State Farm's policies against the drafter, in accordance with our unwavering precedent. See, e.g., *Eljer Manufacturing*, 197 Ill.2d at 293; *Koloms*, 177 Ill.2d at 479; *Outboard Marine*, 154 Ill.2d at 108-09. Noting that State Farm witness Porter testified that State Farm's obligation was everywhere the same, and that State Farm's vice president of claims specified that non-OEM parts must be "of OEM quality," as opposed to the lesser standard of equivalence "to the parts being replaced," which applied only to salvage parts, I would affirm the conclusion of the circuit court and appellate court that State Farm could only satisfy its obligations to its insureds with non-OEM parts of equivalent quality to OEM parts.

C. Damages

The court goes on to discuss the damages awarded on the breach of contract claim, even though doing so is not necessary to its decision. Having already determined that the verdict form was faulty and there was in any event no breach of any of the underlying policies, the court's decision

to address damages is clearly *dictum*, even though the court labels its damages discussion an "additional reason" to reverse. As I stated at the outset, I agree with the court that there is no basis for the so-called "specification" damages. No State Farm policyholder was harmed by the isolated act of State Farm *specifying* that their vehicle was to be repaired with a non-OEM part. Rather, only those policyholders whose vehicles were *actually* repaired with non-OEM parts or who paid the difference to have OEM parts installed can be said to have been harmed.

However, I do not agree with the court's unwarranted attack on plaintiffs' counsel for requesting specification damages. First, it is *wholly* irrelevant to the legal issues involved in this case "why plaintiffs devised their specification-damages theory in the first instance." Slip op. at 33. The court's answer to this question is nothing more than an attack on plaintiffs' counsel as unintelligent and dishonest, in that order. The court reasons that counsel was, at first, ignorant that plaintiffs would have to establish damages without destroying commonality and, then, mendacious enough to deliberately invent a bogus category of damages in order to hoodwink the circuit court into maintaining this action as a class action when it should not have been. Slip op. at 33-34. This vilification of plaintiffs' counsel is wholly speculative and injudicious.

The court's attack has the additional fault of being inaccurate. The court guesses that plaintiffs invented specification damages because without them, plaintiffs would have been "unable to establish damages and still maintain the commonality required of a class action." Slip op. at 33. And yet, the court does not hold that the other category of damages plaintiffs claimed, installation damages, destroyed commonality. In fact, the court admits that

there is nothing wrong with “us[ing] statistical inference in determining aggregate damages in a class action suit” (slip op. at 37), as plaintiffs did with respect to installation damages. The court here implicitly admits that plaintiffs *could* have established installation damages without destroying commonality (the court simply holds that plaintiffs presented insufficient *evidence* to support their installation damage claim in this case, a conclusion with which I disagree, as I shall discuss). So the “realization” the court attributes to plaintiffs is entirely false. And thus the attack on plaintiffs’ counsel, along with the impugning of their integrity, unwarranted even if it were accurate, is ill-founded as well.

With respect to installation damages, I would hold that plaintiffs did present sufficient evidence to uphold their installation damages claim. This court has stressed that the determination of the amount of damages is a function reserved to the trier of fact and that a reviewing court should not substitute its opinion for the judgment rendered in the trial court. *Richardson v. Chapman*, 175 Ill.2d 98, 113 (1997). Moreover, “a court reviewing a jury’s assessment of damages should not interfere unless a proven element of damages was ignored, the verdict resulted from passion or prejudice, or the award bears no reasonable relationship to the loss suffered.” *Snelson v. Kamm*, 204 Ill.2d 1, 37 (2003). Therefore, when “the calculations and proportions of the award demonstrate a strong relation to the evidence presented, the jury’s determination *cannot* be against the manifest weight of the evidence. See *Jones v. Chicago Osteopathic Hospital*, 316 Ill.App.3d 1121, 1138, (2000) (if a jury’s award falls within the flexible range of conclusions reasonably supported by the evidence, it must stand).” (Emphasis added.)

Snelson, 204 Ill.2d at 38-39. These long-standing principles are nowhere acknowledged in today's opinion.

The court's damages discussion presents an anomaly in American jurisprudence, in that it would reverse a damage award for being *too low*. I know of no rule of law which would lead a court of review to conclude, as the court does today, that if the jury had given plaintiffs more than it believed the plaintiffs had proven they deserved, it would affirm, but because the jury was conservative and awarded a low amount, plaintiffs are entitled to no compensation at all.

In my view, the court appears to be punishing the conservatism of the jury's damage award. Dr. Mathur testified that damages could be as high as \$1.2 billion. He also testified that his estimate could be off by as much as \$1 billion. The jury obviously took Dr. Mathur at his word. The jury accepted the top estimate Dr. Mathur suggested, but reduced his highest estimate by the largest correction he endorsed. These calculations clearly "demonstrate a strong relation to the evidence presented" (*Snelson*, 204 Ill.2d at 38), and thus are not against the manifest weight of the evidence. I decline to join the court's suggestion that jury awards which bear a strong relation to the evidence presented might still be reversed for being too low, and I question the impact the court's discussion will have on future damage awards in this state. And, again, it is worth recalling that the entire discussion here is *dictum*, as the court has already determined that the plaintiff class is entitled to no relief on other, independent grounds. The court's decision to include this analysis cannot be understood as anything but a decision to attack this particular jury verdict on every conceivable front.

D. Disposition

In light of the foregoing, I believe that the appropriate disposition with regard to the breach of contract claim is to remand the cause to the circuit court to determine whether there exists any subclass of the nationwide class with respect to which the verdict may be upheld. In contrast to my colleagues, I believe that the proper reason for reversing the nationwide class is the *Shutts* problem: there are outcome-determinative differences between the laws of Illinois and the laws of other states, and Illinois has no compelling interest in applying its law to states whose laws differ. See *supra*, slip op. at 91 (Freeman, J., concurring in part and dissenting in part). But the fact that there are outcome determinative differences between Illinois and *some* other states does not mean that there are outcome-determinative differences between Illinois and *all* other states. Thus, on remand, I would direct the circuit court to hold a hearing to determine which (if any) of the states that have been the subject of evidence in these proceedings is sufficiently closely aligned with Illinois law that the use of Illinois law to determine the contractual rights of State Farm's policyholders in that state would not offend State Farm's due process rights. Such a result would be well within the circuit court's inherent power to manage class actions. See 735 ILCS 5/2-802(a), (b) (West 1998). See also *Purcell & Wardrobe, Chartered v. Hertz Corp.*, 279 Ill.App.3d 16, 20 (1996) ("A class action may, nevertheless, still be maintained, despite these conflicting or differing State laws, and the court may simply choose to divide the class into subclasses. Moreover, if at some later time in the litigation, the subclassification becomes unmanageable, the court, of course, always has the option to set aside the class certification or a portion of it"), quoting

Purcell & Wardrobe, Chartered v. Hertz Corp., 175 Ill.App.3d 1069, 1075 (1988). Assuming that all the requirements of a class action are satisfied with respect to such a subclass, the verdict could be affirmed with respect to that subclass, with damages equal to the *pro rata* portion of the nationwide installation damages attributable to the policyholders in those states.

Notwithstanding the decertification of the entire nationwide class, a considerable volume of evidence has been received in connection with this matter and considerable judicial resources which have been expended thereon. As previously noted, this trial lasted nearly two months and the pretrial proceedings spanned more than two years. It would be contrary to any proper sense of judicial economy to require a retrial as to the contract issues for the rights of any subclass of policyholders to which Illinois law could be applied without impacting the due process rights of State Farm.

Nor is judicial economy the only interest to be served by making all reasonable efforts to uphold the verdict to the extent possible. Class actions are a valued, indeed an integral, part of our judicial system and our society. As Chief Justice Burger, in writing for the United States Supreme Court, recognized,

"The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the

class-action device." *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326, 339, 63 L.Ed.2d 427, 440, 100 S.Ct. 1166, 1174, (1980).

In other words, the class action makes it possible for wrongs, which might otherwise go unredressed, to be pursued, and righted. The possibility that wrongdoers might be held accountable provides a powerful incentive not to engage in even small-scale wrongdoing, and such an incentive can only benefit society as a whole. If there was a wrong committed here – as the jury found, the trial court agreed, the appellate court confirmed, and I would affirm – State Farm ought to be held accountable therefor to the extent that due process will allow.

II. CONSUMER FRAUD

I concur in the court's analysis of the consumer fraud issue. However, the court's analysis includes an instance of objectionable *dicta*. Also, as with the breach of contract issue, I find the tone and tenor of the court's analysis to be injudicious. I, therefore, disavow and dissent from those instances of hostile rhetoric and objectionable *dicta*.

I agree with the court's analysis of the consumer fraud issue. Due to inconsistencies in the arguments of counsel and analyses in the lower courts, the court correctly discusses what allegations are *not* at issue. Slip op. at 53-59. This discussion leads to the core allegation of plaintiff's consumer fraud claim: that, during the claims process, State Farm failed to disclose the categorical inferiority of non-OEM parts. Slip op. at 59-60.

Turning to the propriety of the nationwide consumer fraud class, the court opinion correctly holds that the

Illinois Consumer Fraud Act has no out-of-state effect and I expressly agree with the court's analysis of this issue. Slip op at 61-70. Further, the court correctly concludes that, in this case, the Consumer Fraud Act applies only to those policyholders whose vehicles were assessed and repaired in Illinois. Accordingly, the court focuses its application of the Act solely on DeFrank, who is the only named plaintiff who can represent an Illinois class. Slip op. at 70-78.

The court eventually concludes as follows. DeFrank suffered no actual damage as a result of State Farm's specification of non-OEM parts. Slip op. at 75-78. Also, based on this court's *Zekman* and *Oliveira* decisions, and DeFrank's testimony, DeFrank was not actually deceived by anything State Farm said or did not say regarding the quality of non-OEM parts. Slip op. at 78-81.

Although I concur in the court's analysis of the consumer fraud issue, I dissent from an instance of objectionable *dicta*. It is found in section II(C)(2) of the court opinion, captioned "The Deceptive Act or Practice." Slip op. at 72-75. Prior to reaching the determinative issues with respect to DeFrank, the court opinion purports to identify the deceptive act or practice that pertains to DeFrank. However, the opinion already identified this claim. Slip op. at 58-59. The clear purpose of this section is to discuss the state regulation of aftermarket crash parts as a possible basis for reversal. At the close of this discussion, the court expressly declines to resolve the issue. If the court is unwilling to resolve this issue, then the court should not raise it.

I also take issue with the tenor of the court's analysis of the consumer fraud claim. Like the section dealing with

breach of contract, the court indulges in sarcasm, chiding, and innuendo in furtherance of needless and intemperate attacks on the plaintiffs bar and our own appellate court. Some examples follow:

"Plaintiffs deliberately avoided any theory relating to defective parts at trial because such a theory would have significantly increased their burden of proof. Such a theory would also have rendered class certification far less likely, since the common question of fact or law necessary for certification would have been more difficult to establish if plaintiffs had been forced to prove that each individual non-OEM part, or grouping of parts, was defective." Slip op. at 54.

This is sheer speculation. Also, the majority suggests that the appellate court intentionally rephrased or recharacterized DeFrank's actual damages to avoid certain "temporal problems." Slip op. at 77. Assigning such motives to the appellate court constitutes unfair innuendo. These statements impugn the integrity of the bench and bar. I expressly disavow them.

CONCLUSION

Although I am in agreement with my colleagues on a number of legal points, I disagree with many conclusions reached by them today. I find the tone taken by the court with respect to plaintiffs' trial counsel and the lower courts to be particularly unwarranted given that their actions were not especially egregious. They did not flout any of the rules of this court nor did they break with precedent in such a way as to deserve condemnation. Thus, the question becomes, from whence does this hostility come? What is not said anywhere in today's opinion is the fact that this

case has been the focus of a great deal of national attention with respect to class actions in general and our Fifth District in particular. In my view, today's opinion appears to be my colleagues' point of entry into the ongoing national debate concerning class action litigation. It is my considered opinion, however, that while this debate is being conducted in the legislative arena amongst our elected officials in Congress and the Illinois General Assembly, we in the judiciary ought to tread carefully.

I am as troubled as every citizen ought to be about the possibility of abuse of the class action vehicle. And it would further no end to feign ignorance of the fact that some allegations of abuse have been leveled at the courts of this state, and the Fifth District in our state in particular. However, as the saying goes, the baby should not be thrown out with the bathwater. In 1977, this court acknowledged the utility of the class action as a method of litigating complex common questions brought by numerous claimants:

"A class action is a potent procedural vehicle. Under its terms claims by multiple persons can be decided without the necessity of the appearance of each. A vindication of the rights of numerous persons is possible in a single action when for many reasons individual actions would be impracticable. [Citations.] The origins of this invention of equity, according to Professor Chafee [citation], go back almost 300 years. Its purpose has been described as 'to enable it [equity] to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable.'

[Citation.]” *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 334-35 (1977).

Several years later, the United States Supreme Court echoed our sentiments, noting:

“The class-action device was designed as ‘an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’ [Citation.] Class relief is ‘peculiarly appropriate’ when the ‘issues involved are common to the class as a whole’ and when they ‘turn on questions of law applicable in the same manner to each member of the class.’ [Citation.] For in such cases, ‘the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under [Federal Rule of Civil Practice] 23.’ [Citation.]” *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 155, 72 L.Ed.2d 740, 749, 102 S.Ct. 2364, 2369 (1982).

These observations illustrate why class actions have long held a legitimate and important place in the judiciary. Both this court and the United States Supreme Court have approved of this litigation tool for over 100 years. See K. Forde, *Illinois's New Class Action Statute*, 59 Chi. B. Rec. 120 (1977) (explaining historical background of class actions). In their haste, perhaps, to take a stand on the class action question, my colleagues seemingly retreat from these time-honored principles and show a new hostility to a long-recognized form of litigation. I feel it is my duty to remind my colleagues that the same standards of review that are at play in the other four districts of the state apply to the Fifth District. I am concerned that today's opinion sends a message that we, as a court, will

employ different standards for cases coming out of the Fifth District on which national attention has been focused in order to reach a desired result. My feelings in this regard stem from the fact that in overturning the verdict in its entirety, my colleagues in this case have ignored the standard of review, humiliated plaintiffs' counsel, and demeaned both the trial court and the appellate court. It is my sincere hope that the rhetoric employed in today's opinion will not serve to further coarsen a debate already littered with incivility and hostility.

JUSTICE KILBRIDE joins in this partial concurrence and partial dissent.

321 Ill.App.3d 269, 746 N.E.2d 1242 (5th Dist. 2001)

Appellate Court of Illinois,
Fifth District.

Michael E. AVERY et al., on behalf of themselves and all
others similarly situated, Plaintiffs-Appellees,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE
COMPANY, Defendant-Appellant.

No. 5-99-0830.

April 5, 2001.

Michele Odorizzi, Bradley J. Andreozzi, Allan Erbsen, Mayer, Brown & Platt; William R. Quinlan, Gino L. DiVito, Quinlan & Crisham, Ltd., Chicago, IL; Wm. Kent Brandon, Brandon, Schmidt, Goffinet & Solverson, Carbondale, IL; Robert H. Shultz, Jr., Heyl, Royster, Voelker & Allen, Edwardsville, IL; Marci A. Eisenstein, Aphrodite Kokolis, Schiff, Hardin & Waite, Chicago, IL, Attorneys for Appellant.

Edward J. Kionka, Carbondale, IL; Elizabeth J. Cabraser, Morris A. Ratner, Scott P. Nealey, Yu-Yee Wu, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA; Patricia S. Murphy, Marion, IL; Michael B. Hyman, William H. London, Melinda J. Morales, Much, Shelist, Freed, Denenberg, Ament & Rubenstein, P.C., Chicago, IL; Don Barrett, Richard R. Barrett, S. Katherine Barrett, Barrett Law Offices, Lexington, MS; Thomas P. Thrash, Little Rock, AR, Attorneys for Appellees.

Justice MAAG delivered the opinion of the court:

State Farm Mutual Automobile Insurance Company (State Farm) appeals from a \$1.18 billion judgment entered against it in a nationwide class action lawsuit tried in the circuit court of Williamson County, Illinois.

The three-count complaint, filed on behalf of a class of State Farm automobile insurance policyholders (plaintiffs), alleged breach of contract, consumer fraud, and claims seeking equitable relief. On appeal State Farm seeks the decertification of the class and a reversal of the judgment below or, alternatively, a new trial. State Farm also seeks to have the punitive damages award vacated or reduced.

[The following text is nonpublishable under Supreme Court Rule 23 (166 Ill.2d R. 23).]

[The preceding text is nonpublishable under Supreme Court Rule 23.]

In count I of the complaint, plaintiffs alleged that State Farm issued form contracts containing an identical promise to its policyholders nationwide. Plaintiffs contended that in exchange for payment of the insurance premium, State Farm had promised to pay for replacement parts of "like kind and quality" that would restore the vehicle to its "pre-loss condition" and that it breached this promise by uniformly specifying inferior non-original equipment manufacturer (non-OEM) parts when they were available and cheaper than original equipment parts made by the automobile manufacturer (OEM). Counts II and III alleged violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (CFA) (815 ILCS 505/1 *et seq.* (West 1998)). In those counts, plaintiffs claimed that State Farm had a nationwide claims practice of uniformly specifying cheaper non-OEM crash parts on damage estimates issued to its policyholders despite the fact that it knew that those parts were inferior in quality and condition and would not return the damaged vehicle to its preloss condition. Plaintiffs claimed that by adopting

and employing this claims practice, State Farm deceived its policyholders in that it failed to inform them of the inferior quality of specified replacement parts. It was alleged that State Farm was able to succeed in this deception by representing that the inferior parts met high performance criteria and by offering a bogus guarantee to replace unsatisfactory non-OEM parts at no cost to the policyholder.

State Farm objected to the certification of the class, on the grounds that the individual questions of fact and law overwhelmingly dominated any purported common questions in the contract and consumer-fraud claims. State Farm also denied the allegations of the complaint.

The trial court conducted a pretrial evidentiary hearing on the class-certification issue. After considering documents and the testimony of several witnesses, the court certified the class as follows:

“All persons in the United States, except those residing in Arkansas and Tennessee, who (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had imitation[,] that is, non-factory-authorized and/or non-OEM parts installed on their vehicles or else received monetary compensation determined in relation to the cost of imitation parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided in Illinois and whose policies were issued/executed prior to April 16, 1994, and (2) persons who resided in

California and whose policies were issued/executed prior to September 26, 1996.”

The trial court also reviewed State Farm auto policies that were issued to class members who resided in states other than Illinois. The court found that there were some variations in the form of the policy from state to state, but it concluded that these variations were immaterial because the operative policy language in each policy was susceptible to uniform interpretation. The court determined that in each policy State Farm made the identical promise to pay for parts “of like kind and quality” that would restore the vehicle to its “original pre-loss condition”.

[The following text is nonpublishable under Supreme Court Rule 23.]

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I. Plaintiffs’ Contentions At Trial

A. Breach of Contract

In the breach-of-contract claim, plaintiffs alleged that State Farm’s practice of specifying non-OEM parts constituted a breach of its contractual obligation to pay for parts “of like kind and quality” to restore the vehicles to “pre-loss condition”. This class-wide claim was based on plaintiffs’ theory that the non-OEM parts specified in the damage estimates were categorically inferior. Plaintiffs presented evidence to demonstrate that State Farm had a uniform, corporate-wide claims adjustment manual that dictated the policy for the settlement of property-damage claims with its insureds and that this policy and practice

was devised, implemented, dictated, and monitored from its home office in Bloomington, Illinois.

[The following text is nonpublishable under Supreme Court Rule 23.]

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B. The Consumer Fraud Act

In the consumer-fraud claim, plaintiffs alleged that State Farm knowingly concealed information about the inferior condition of the non-OEM parts it was specifying on damage estimates and misrepresented the quality and condition of those parts to its policyholders. Plaintiffs presented evidence, in the form of State Farm's own documents and testimony from past and current State Farm employees, to show that State Farm knew that the non-OEM parts were inferior in terms of fit, quality, function, performance, corrosion resistance, appearance, and safety. These parts were represented to policyholders as "quality replacement parts". There was also evidence that State Farm's guarantee that it would replace non-OEM parts at no cost to the unsatisfied policyholders upon demand was bogus. If the aftermarket part was warranted by the part manufacturer, the policyholder was required to contact the manufacturer for relief. In most cases, these part manufacturers were located outside the United States in Taiwan or another country. If the policyholder demanded replacement of the non-OEM part, a State Farm adjustor was required to investigate the claim, and if it was approved, an OEM replacement part was installed but the cost was charged to the policyholder as an indemnity payment.

II. State Farm's Contentions At Trial

State Farm defended by presenting witnesses who testified that the use of non-OEM parts had been approved in all states in which the class members reside, that non-OEM parts were "equivalent" or "functionally equivalent" to OEM parts, that the use of non-OEM parts did not adversely effect occupant safety, and that non-OEM parts did not reduce the value of the vehicle. State Farm also presented evidence to show that it advised its policyholders of its use of non-OEM parts in the policy, in estimates, and in a pamphlet provided with the estimate. There was also evidence that 95% of State Farm's policyholders renewed their policies. This evidence was offered in an attempt to prove that State Farm insureds were satisfied customers. State Farm also presented as experts those who had practical experience and those with credentials similar to plaintiffs' experts, to counter plaintiffs' opinion witnesses. Thus, there was a classic battle of experts, and the fact finders were required to determine the weight and credibility of these witnesses.

III. The Verdict and Judgment

After many hours of deliberation, the jury returned a verdict on the breach-of-contract claim. The jury found that State Farm failed to perform its obligations under the contract and breached its contract with the plaintiff class. Damages to the plaintiff class were fixed at \$243,740,000 in direct damages and \$212,440,000 in consequential damages.

The consumer-fraud counts of the complaint were resolved in a bench trial. In its written judgment, the trial court found that State Farm misrepresented, concealed,

suppressed, or omitted material facts concerning the non-OEM crash parts with the intent that its policyholders rely upon these deceptions in violation of the CFA. The trial court noted that it concurred with the jury's verdict on the breach-of-contract claim. The court found that plaintiffs had incurred actual damages as a result of State Farm's deceptive practices, but the court did not award actual damages, noting that the jury had awarded identical actual damages in the breach-of-contract case and that plaintiffs could not recover these damages twice. The court awarded the sum of \$130 million in disgorgement damages (representing the direct savings State Farm realized from use of non-OEM parts) and imposed a constructive trust on that sum. The court also awarded \$600 million in punitive damages. The court granted declaratory relief, holding that State Farm was obligated to pay for crash parts of like kind and quality which restored a vehicle to its preloss condition. The court denied the prayer for injunctive relief, finding that there was an adequate remedy at law. Judgment was entered on the verdicts, but the court retained jurisdiction over the parties and the fund to enforce all provisions of the judgment, to administer the damages awarded, and to consider attorney fees. It is from this judgment that State Farm appeals.

IV. Issues on Appeal

[The following text is nonpublishable under Supreme Court Rule 23.]

[The preceding text is nonpublishable under Supreme Court Rule 23.]

There are certain standards that the parties are required to meet when raising any issue on appeal. It is

well established that a court of review is entitled to have briefs submitted that are articulate and organized and present cohesive legal argument in conformity with our Supreme Court rules. *Schwartz v. Great Central Insurance Co.*, 188 Ill.App.3d 264, 268, 135 Ill.Dec. 774, 544 N.E.2d 131, 133 (1989). A reviewing court is also entitled to have issues clearly defined with pertinent authority cited and coherent arguments presented; arguments inadequately presented on appeal are waived. *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill.2d 389, 401, 113 Ill.Dec. 915, 515 N.E.2d 1222, 1227 (1987). Mere contentions without argument or citation of authority do not merit consideration on appeal (*Fuller v. Justice*, 117 Ill.App.3d 933, 942, 73 Ill.Dec. 144, 453 N.E.2d 1133, 1139 (1983)), nor do statements unsupported by argument or citation of relevant authority. *Hutchings v. Bauer*, 212 Ill.App.3d 172, 183, 156 Ill.Dec. 582, 571 N.E.2d 169, 176 (1991), *rev'd on other grounds*, 149 Ill.2d 568, 174 Ill.Dec. 850, 599 N.E.2d 934 (1992). Contentions supported by some argument but by absolutely no authority do not meet the requirements of Supreme Court Rule 341(e)(7) (155 ill.2d r. 341(E)(7)). *in re marriage of drummond*, 156 Ill.App.3d 672, 684, 109 Ill.Dec. 46, 509 N.E.2d 707, 716 (1987). We point out these requirements because in the argument portion of the briefs, nearly every issue argued contains multiple subissues consisting of a single sentence or paragraph. These subissues appear as naked assertions that are rarely clothed with citation to the record or to pertinent authority. Often these miniclaims also lack a developed argument. They appear from nowhere and then vanish in a twinkling, never to be heard of again. We will give these matters all the attention they deserve. None!

These rules have not changed in almost a century. "If the questions involved in a case are of sufficient importance to justify asking this court to decide them, they are worthy of careful consideration of counsel presenting them. If the case is not properly presented and the court is not given the benefit of precedents, there is a danger of a decision being rendered that will not be in harmony with the weight of authority. It is the duty of attorneys practicing in this court to present to the court the authorities supporting their views[] and to assist the court in reaching a correct conclusion." *Kelley v. Kelley*, 317 Ill. 104, 107, 147 N.E. 659 (1925). "Reviewing courts are entitled to have issues clearly defined [and] to be cited pertinent authorities and are not a depository in which an appellant is to dump the entire matter of pleadings, court action, argument[,] and research as it were, upon the court." *In re Estate of Kunz*, 7 Ill.App.3d 760, 763, 288 N.E.2d 520, 523 (1972).

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During the trial and on appeal, the parties argued at length about whether the evidence at trial established that non-OEM parts were inferior to OEM parts, whether non-OEM parts were categorically inferior, and what other conclusions should be drawn from the evidence presented. It is not our function as a reviewing court to reweigh the evidence. The rule we must apply in considering the evidence is as follows:

"An initial step in analyzing the issue before us is to determine the authority of the jury, trial

court, and appellate court[] and their relationship to one another. Unquestionably, it is the province of the jury to resolve conflicts in the evidence, to pass upon the credibility of the witnesses, and to decide what weight should be given to the witnesses' testimony. [Citation.] A trial court cannot reweigh the evidence and set aside a verdict merely because the jury could have drawn different inferences or conclusions[] or because the court feels that other results are more reasonable. [Citation.] Likewise, the appellate court should not usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence which did not greatly preponderate either way." *Maple v. Gustafson*, 151 Ill.2d 445, 452-53, 177 Ill.Dec. 438, 603 N.E.2d 508, 511-12 (1992).

We are compelled to view all the evidence and inferences therefrom in the light most favorable to the verdict winner. *Quality Granite Construction Co. v. Hurst-Rosche Engineers, Inc.*, 261 Ill.App.3d 21, 198 Ill.Dec. 528, 632 N.E.2d 1139 (1994). Accordingly, that is the view we adopt in considering the questions of fact raised herein.

While State Farm has not properly preserved for review a number of the issues it has raised in its brief, we must remind the parties that the doctrine of waiver is an admonition upon the parties, not a restriction upon the jurisdiction of a reviewing court. *Hux v. Raben*, 38 Ill.2d 223, 224, 230 N.E.2d 831, 832 (1967). A reviewing court, in its discretion, may consider issues not properly preserved by the parties, in the exercise of its responsibility to reach a just result and to maintain a sound body of precedent. *Hux*, 38 Ill.2d at 225, 230 N.E.2d at 832; *Wagner v. City of Chicago*, 166 Ill.2d 144, 148, 209 Ill.Dec. 672, 651 N.E.2d

1120, 1122 (1995). In this decision, we have pointed out a number of instances where an issue raised on appeal has, in fact, been waived, and then we have proceeded to address many of those issues on the merits. We did so in the interest of thoroughly considering the issues raised in this appeal. Our consideration of the merits did not change the outcome.

A. The Class Certification

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The policy objective behind the class action is to encourage individuals, who may otherwise lack incentive to file individual actions because their damages are limited, to join with others to vindicate their rights in a single action. *Hansberry v. Lee*, 311 U.S. 32, 41, 61 S.Ct. 115, 118, 85 L.Ed. 22, 27 (1940). In *Hoover v. May Department Stores Co.*, this court noted that class actions are particularly attractive in consumer-protection cases because individual suits are often not economically feasible. *Hoover v. May Department Stores Co.*, 62 Ill.App.3d 106, 112, 19 Ill.Dec. 147, 378 N.E.2d 762, 768 (1978), *rev'd on other grounds*, 77 Ill.2d 93, 32 Ill.Dec. 311, 395 N.E.2d 541 (1979). The slight loss to the individual, when aggregated in the coffers of the wrongdoer, results in recovery that is worthy of an attorney's time and costs of litigation and that provides some measure of restitution to the injured party and deterrence to the wrongdoer. See *Hoover*, 62 Ill.App.3d at 112, 19 Ill.Dec. 147, 378 N.E.2d at 768;

Gordon v. Boden, 224 Ill.App.3d 195, 204, 166 Ill.Dec. 503, 586 N.E.2d 461, 467 (1991).

In order to maintain a class action in Illinois, the court must find that (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of fact or law common to the class, (3) the representative parties will fairly and adequately protect the interests of the class, and (4) the class action is an appropriate method for the fair and efficient adjudication of the controversy. 735 ILCS 5/2-801 (West 1998).

The certification of a class is within the sound discretion of the trial court and will be disturbed only upon a clear abuse of discretion or application of impermissible legal criteria. *Slimack v. Country Life Insurance Co.*, 227 Ill.App.3d 287, 292, 169 Ill.Dec. 190, 591 N.E.2d 70, 74 (1992). The scope of appellate review is limited to an assessment of the trial court's exercise of discretion and does not extend to an independent, *de novo* evaluation of the facts alleged to justify litigation of the case as a class action. *Carrao v. Health Care Service Corp.*, 118 Ill.App.3d 417, 427, 73 Ill.Dec. 684, 454 N.E.2d 781, 789 (1983).

On appeal, State Farm claims that the trial court abused its discretion by certifying and thereafter failing to decertify the class of millions of policyholders, because all prerequisites of the class action statute were not met.

State Farm does not actively dispute the trial court's finding that the class is so numerous that joinder of all members would be impractical. There is no question that litigating individual lawsuits would be a waste of judicial resources and that addressing common issues in one action would aid judicial administration. The fact that there may be many individual issues is relevant to the

ultimate decision whether to certify the case as a class action. It is irrelevant to the numerosity and joinder element. Therefore, the first prerequisite of section 2-801 of the Code of Civil Procedure (Code) (735 ILCS 5/2-801 (West 1998)) is established. See *Gordon*, 224 Ill.App.3d at 200, 166 Ill.Dec. 503, 586 N.E.2d at 464.

Turning to the second prerequisite, State Farm contends that class certification was improper because common questions of fact or law did not predominate over questions affecting only individual class members. State Farm argues that in order to determine whether each class member has a right to an award of damages under the breach-of-contract claim, there must be evidence concerning each member's repairs, including identification and evaluation of the damaged part and the specified replacement part, evidence of the vehicle's preloss condition, any affirmative defenses such as waiver or consent, and whether and the extent to which each member was damaged by the alleged breach.

As long as there are questions of fact or law common to the class and these predominate over questions affecting only individual members of the class, the provisions of subsection 2-801(2) (735 ILCS 5/2-801(2) (West 1992)) have been met. *Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 338, 13 Ill.Dec. 699, 371 N.E.2d 634, 643 (1977). A common question may be shown when the claims of the individual class members are based upon the common application of a statute or when the members are aggrieved by the same or similar conduct (*Miner*, 87 Ill.2d at 19, 56 Ill.Dec. 886, 428 N.E.2d at 484-85) or a pattern of conduct (*Slimack*, 227 Ill.App.3d at 299, 169 Ill.Dec. 190, 591 N.E.2d at 78; *Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill.App.3d 1069, 1077, 125 Ill.Dec. 585, 530

N.E.2d 994, 1000 (1988)). Satisfaction of the prerequisite pertaining to predominating common questions of fact or law necessitates a showing that successful adjudication of the purported class representatives' individual claims will establish a right of recovery or resolve a central issue on behalf of the class members. *Society of St. Francis v. Dulman*, 98 Ill.App.3d 16, 18, 53 Ill.Dec. 646, 424 N.E.2d 59, 61 (1981). The fact that the class members' recoveries may be in varying amounts which must be determined separately does not necessarily mean that there is no predominate common question. *Society of St. Francis*, 98 Ill.App.3d at 18, 53 Ill.Dec. 646, 424 N.E.2d at 61; *McCarthy v. LaSalle National Bank & Trust Co.*, 230 Ill.App.3d 628, 634, 172 Ill.Dec. 86, 595 N.E.2d 149, 153 (1992).

The record demonstrates that plaintiffs presented evidence to show that State Farm made the same promise (i.e., to pay for parts "of like kind and quality" to restore "pre-loss condition") to its policyholders throughout the country. State Farm's own witness, Don Porter, a claims consultant, acknowledged that State Farm had a uniform nationwide obligation to policyholders. This promise was to specify parts of like kind and quality to OEM parts so as to restore preloss condition. State Farm devised a nationwide policy mandating the use of non-OEM parts in its insureds' property-damage claims if those parts were cheaper and available. It also established uniform procedures to implement that policy, while simultaneously denying its claims estimators any discretion to substitute OEM parts for non-OEM parts. Each class member had received an estimate from State Farm specifying non-OEM replacement parts. Plaintiffs claimed that the non-OEM parts specified by State Farm were categorically inferior

and failed to restore the vehicles to their "pre-loss condition". The claim was supported with expert testimony, from which it could be reasonably inferred, if accepted as true, that the lot of non-OEM parts specified by State Farm was inferior in terms of appearance, fit, quality, function, durability, and performance.

In regard to the consumer-fraud claim, the record contained evidence that State Farm engaged in an ongoing course of conduct nationwide, in which it specified inferior non-OEM parts whenever those parts were cheaper and available, that State Farm knew those parts were inferior, that State Farm did not inform its policyholders of the problems with those parts, and that State Farm affirmatively misrepresented the condition of those parts by assuring policyholders – on the damage estimates and in brochures – that it specified only "quality replacement parts" and that it guaranteed the parts at no additional cost.

In the certification order, the trial court found that there were factual and legal issues regarding the breach-of-contract and consumer-fraud claims common to all class members, which predominated over other issues. There was ample support for the court's finding that there were questions of fact regarding the breach-of-contract and deceptive claims practices common to the class. See *Miner*, 87 Ill.2d at 19, 56 Ill.Dec. 886, 428 N.E.2d at 484-85; *Gordon*, 224 Ill.App.3d at 200-02, 166 Ill.Dec. 503, 586 N.E.2d at 465. The fact that a different conclusion might be arguable does not diminish the deference we must give to decision of the trial court.

State Farm next asserts that it was error to certify a nationwide consumer-fraud class because the claims of

non-Illinois class members are governed by varying consumer-fraud laws in 48 states. We reject this argument for several reasons. First, the question of whether laws of different states apply to specific transactions alleged in a class action does not ordinarily prevent certification of the class. *Gordon*, 224 Ill.App.3d at 202, 166 Ill.Dec. 503, 586 N.E.2d at 466; *Purcell*, 175 Ill.App.3d at 1075, 125 Ill.Dec. 585, 530 N.E.2d at 998. Illinois courts have found class actions maintainable in situations where the class includes the residents of other states. See *Landesman v. General Motors Corp.*, 42 Ill.App.3d 363, 1 Ill.Dec. 105, 356 N.E.2d 105 (1976), *vacated & rem'd on other grounds*, 72 Ill.2d 44, 18 Ill.Dec. 328, 377 N.E.2d 813 (1978); *Hoover*, 62 Ill.App.3d at 112, 19 Ill.Dec. 147, 378 N.E.2d at 768. The CFA does not limit its application to resident consumers. To deny an out-of-state plaintiff a remedy against a resident of Illinois would violate the legislative directive that the CFA be liberally construed to achieve its remedial purposes. Non Illinois consumers have been permitted to pursue an action under the CFA against a resident defendant where the deceptive acts and practices were perpetrated in Illinois. See *Martin v. Heinold Commodities, Inc.*, 117 Ill.2d 67, 83, 109 Ill.Dec. 772, 510 N.E.2d 840, 847 (1987).

Second, the circuit court found that there were no true conflicts between the substantive laws of Illinois and those of the other states whose residents were part of the class. After reviewing those portions of the insurance statutes pertaining to the use of non-OEM parts and the consumer-protection statutes contained in this record, we have concluded that State Farm's deceptive practices were neither specifically authorized nor in compliance with the laws in any of the 48 states. In addition, the public policy

espoused in the laws of our sister states does not conflict with the public policy of Illinois. Former and current representatives of state insurance commissioners testified that the laws in many of our sister states permit and in some cases encourage the use of non-OEM parts as an effort to encourage competitive price control. But each witness admitted unequivocally that his respective state would not sanction the use of *inferior* aftermarket replacement parts.

State Farm has not identified any state that authorizes an insurer to specify inferior replacement parts. State Farm has not demonstrated that its conduct is authorized by any other state's laws nor that compliance with the substantive laws of Illinois would lead it to violate a law or regulation imposed by any other state. We also reject State Farm's argument that the application of the CFA to "transactions occurring in other states" violates interstate commerce and the sovereignty of those states. The resolution of this case under Illinois law does not violate another state's sovereignty, nor is interstate commerce adversely impacted. The evidence demonstrates that the deceptive claims practices occurred in Illinois. It was in Illinois that the claims practices were devised and procedures for implementation were prepared for dissemination in other states. There is no showing that a conflict exists between the laws of Illinois and our sister states regarding the use of inferior aftermarket parts.

Third, Illinois has significant contacts to the claims asserted by each class member. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22, 105 S.Ct. 2965, 2980, 86 L.Ed.2d 628, 648 (1985). Plaintiffs' complaint was predicated on identical promises made in standard-form insurance contracts issued to policyholders throughout the

country and upon a claims practice that was uniform nationally. This action was filed against a company chartered and headquartered in Illinois. There is substantial evidence the deceptive claims practices were designed, established, and initiated from State Farm's corporate headquarters in Bloomington, Illinois, and dictated and disseminated to State Farm employees nationwide. Illinois has a legitimate interest in applying its law to adjudicate this dispute and to insure that its residents comply with its consumer-protection laws while serving Illinois and out-of-state consumers. See *Martin*, 117 Ill.2d at 82, 109 Ill.Dec. 772, 510 N.E.2d at 846-47. State Farm has not demonstrated that Illinois courts would lack jurisdiction to adjudicate or would decline to apply the substantive law of Illinois to a consumer-fraud or contract action filed by an individual out-of-state policyholder on these facts. In our view, Illinois has sufficient contacts so that the application of its consumer-fraud laws to all class claimants is neither unfair nor a violation of due process. See *Martin*, 117 Ill.2d at 82, 109 Ill.Dec. 772, 510 N.E.2d at 846-47; *Gordon*, 224 Ill.App.3d at 202, 166 Ill.Dec. 503, 586 N.E.2d at 466.

State Farm also contends that individualized proofs were necessary to determine which class members had non-OEM parts installed on their vehicles, to determine the quality of the non-OEM parts specified and the preloss condition of class members vehicles, to assert affirmative defenses, and to establish the nature and extent of the damages on each insured vehicle and that these questions predominate over questions common to class members.

In Illinois, a class action is appropriate if common questions predominate over individual questions. *Steinberg*, 69 Ill.2d at 338, 13 Ill.Dec. 699, 371 N.E.2d at 643. Once this determination has been made, the hypothetical

existence of individual defenses and the need for individual proofs on subsidiary questions will not overcome the predominate common question and defeat the class. *Harrison Sheet Steel Co. v. Lyons*, 15 Ill.2d 532, 538, 155 N.E.2d 595, 598 (1959). We are not convinced that individual questions regarding affirmative defenses identified by State Farm amount to anything more than hypothetical questions. Moreover, a number of these individual questions have been satisfactorily addressed by the trial court or lack evidentiary support in the record.

According to the record, State Farm maintains a central database from which past and present policyholders can be identified and a claims history can be established. Thus, through its own records State Farm is capable of identifying class members who have had non-OEM parts installed on their vehicles. The fact that individual determinations as to damages will be necessitated (because some class members may be awarded both specification damages and installation damages while others may be awarded only specification damages) will not defeat the class. Common issues of State Farm's contractual and statutory violations predominate. See *Gordon*, 224 Ill.App.3d at 202-03, 166 Ill.Dec. 503, 586 N.E.2d at 466.

The condition of non-OEM parts specified by State Farm was subject to class-wide proofs. According to plaintiffs' theory, these non-OEM parts were categorically inferior. Plaintiffs also presented evidence to show that State Farm did not factor a vehicle's preloss condition into the damage assessment process and into the selection and specification of replacement parts. State Farm notes that it presented evidence of the preloss condition of some of the class representatives' vehicles. However, State Farm

does not point to any evidence in the record to show that the preloss condition was a factor in the damage estimates. It has not claimed that in specifying repair parts, it sought to duplicate any preloss damage to that vehicle. State Farm does not contend, for example, that if a fender had a dent prior to an accident, its practice was to require the body shop to dent the replacement part or to specify a dented replacement fender on the estimate. To the contrary, the unequivocal and singular conclusion that could be drawn from the evidence is that when a property damage claim was made, State Farm did not concern itself with trying to duplicate preloss injury or damage. Preloss condition played no part in specification of replacement parts on class members vehicles. Given this policy of State Farm's indifference to preloss condition when it specified replacement parts, requiring plaintiffs to present proof of preloss condition would have been pointless. State Farm did not consider this in its claim practice. The evidence would have been irrelevant. Only relevant evidence is admissible. "Relevancy is established where a fact offered tends to prove a fact in controversy or renders a matter in issue more or less probable." *Marut v. Costello*, 34 Ill.2d 125, 128, 214 N.E.2d 768, 769 (1965).

State Farm has not identified in this record any offer of proof to show that it could establish individual affirmative defenses. We note that State Farm argued that statutes in a few states required the policyholder to consent to the use of non-OEM parts. State Farm failed to produce evidence that any policyholder from any of those states had in fact consented to the use of inferior non-OEM parts. State Farm points out that one of its claims agents testified that one policyholder requested less expensive non-OEM parts. It failed, however, to present

evidence showing that the policyholder had in fact consented with knowledge that the parts were inferior in quality and condition.

Where a complaint is made that the trial court's ruling precluded the presentation of evidence to support a claim or defense, the nature and context of the evidence must be disclosed. This disclosure through an offer of proof allows the trial and appellate courts to evaluate the proposed evidence and consider its relevance to the matters at issue. *Holder v. Caselton*, 275 Ill.App.3d 950, 212 Ill.Dec. 479, 657 N.E.2d 680 (1995). Unless the offer of proof is excused because it is apparent from the context, the failure to make an offer of proof precludes raising the issue on appeal. *Tarshes v. Lake Shore Harley Davidson*, 171 Ill.App.3d 143, 121 Ill.Dec. 88, 524 N.E.2d 1136 (1988). Merely alluding to what might be divulged does not preserve error for appeal. *People v. Brown*, 104 Ill.App.3d 1110, 60 Ill.Dec. 843, 433 N.E.2d 1081 (1982). The issue is waived. Nevertheless, to the extent possible based on the record, we have considered the issue.

On this record, there is not sufficient evidence to support the affirmative defenses alleged. The need for individual proofs on subsidiary issues did not predominate over questions common to the class. See *Harrison Sheet Steel Co.*, 15 Ill.2d at 538, 155 N.E.2d at 598. In addition, State Farm has not shown that its opportunity to defend any individual issues was impaired or that it suffered great inconvenience by litigating those issues in a single action instead of in separate actions. *Harrison Sheet Steel Co.*, 15 Ill.2d at 538, 155 N.E.2d at 598. Stated simply, the proof at trial did not support State Farm's claim. The second prerequisite has been met.

Turning to the third prerequisite, State Farm contends the class representatives do not fairly and adequately protect the interests of the class. State Farm argues that because it is a mutual insurance company, there is a conflict between class members, in that current policyholders have an interest in keeping damage awards low and in continuing the use of non-OEM parts in order to keep premium costs down, while former policyholders have no such interest.

The purpose of the adequate-representation requirement is to ensure that all class members will receive proper, efficient, and appropriate protection of their interests in the presentation of the claim. *Gordon*, 224 Ill.App.3d at 203, 166 Ill.Dec. 503, 586 N.E.2d at 466. The record does not support State Farm's claim that the interests of some class members are antithetical to the interests of others. State Farm's actuary testified that any damages awarded would be paid from the company's reserves and would not affect premiums and that the amount awarded would not affect the company's financial viability or its ability to pay dividends or future claims. Further, there is no evidence that any of the policyholders, past, present, or future, would approve of or encourage State Farm to continue to specify inferior crash parts on repairs of their own cars. The party representatives and the absent class members share a common interest in establishing the essential elements sought to be litigated on behalf of the class. On this record, the trial court properly concluded that there was no conflict among class members. See *Slimack*, 227 Ill.App.3d at 299-300, 169 Ill.Dec. 190, 591 N.E.2d at 78.

There is no doubt that the attorneys representing the plaintiff class are qualified and experienced. From our

review of the record, class counsel appeared to be prepared and well-versed in the facts and the applicable law. Accordingly, we cannot say that the trial court abused its discretion in finding that the class representatives would adequately protect the interests of the class.

As to the final requirement, State Farm alleges that the trial court erred by focusing on the statutory requirement of efficiency and ignoring the requirement that a class action must be a fair way to adjudicate the controversy. We disagree with the claim that the trial court ignored this requirement. The trial court carefully considered whether each party would be able to fairly present its case and whether a class action best served the economies of time, effort, and expense, while promoting uniformity of decision in contract interpretation. It concluded that these requirements could be and were met. See *Steinberg*, 69 Ill.2d at 339, 13 Ill.Dec. 699, 371 N.E.2d at 644; *Gordon*, 224 Ill.App.3d at 203, 166 Ill.Dec. 503, 586 N.E.2d at 466. We find no abuse of discretion.

Based upon even a cursory review of the record, there is little doubt that any individual cases would be defended as vigorously as the case at bar. The costs of pursuing the case on an individual basis would greatly exceed any recovery. See *Gordon*, 224 Ill.App.3d at 203-04, 166 Ill. Dec. 503, 586 N.E.2d at 467. Accordingly, we find that the prerequisites of the class action statute have been met and that the circuit court did not abuse its discretion in certifying and in refusing to decertify the class.

B. The Notice

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C. Damages

1. Direct and Consequential Damages

In its next point, State Farm claims that the trial court erred in accepting improper damages theories, in accepting or rejecting jury instructions regarding plaintiffs' burden of proof, and in admitting baseless opinion testimony. State Farm alleges that the trial court permitted the plaintiffs to take "short cuts to paper over their inability to present any real class-wide proof" and claims that it committed these errors because of its "desire to preserve the case as a class action". We will address each point in turn. Before addressing these issues, we feel obligated to caution counsel that an appeal is not a license to vilify the trial court. Several comments in this portion of State Farm's brief approach criticism that is inappropriate. Counsel should be mindful of the obligation to temper advocacy with civility. See *Ambrosius v. Katz*, 2 Ill.2d 173, 179-80, 117 N.E.2d 69, 73 (1954). We believe that these brief remarks are sufficient. We will now move on.

State Farm contends that the specification-damages model is legally flawed because OEM replacement parts were installed in the vehicles of many State Farm policyholders despite the fact that the damage estimates specified non-OEM parts. State Farm contends that these class members have incurred no actual damages because the

body shop installed OEM parts at no additional charge. State Farm also alleges that class members who sold their vehicles for fair market value subsequent to the installation of non-OEM parts suffered no actual damages.

Under Illinois law, a contracting party has the right to receive the value of the benefit of his bargain, *i.e.*, the amount that will compensate him for the loss which a fulfillment of the contract would have prevented or the loss which the breach of contract has entailed. See *Lanterman v. Edwards*, 294 Ill.App.3d 351, 354, 228 Ill.Dec. 800, 689 N.E.2d 1221, 1224 (1998); *Illiana Machine & Manufacturing Corp. v. Duro-Chrome Corp.*, 152 Ill.App.3d 764, 768, 105 Ill.Dec. 689, 504 N.E.2d 974, 976-77 (1987). In cases where the breach involved defective performance in the furnishing of goods or services, the measure of damages is the cost of remedying the deficiencies. *Kalal v. Goldblatt Brothers, Inc.*, 53 Ill.App.3d 109, 112, 11 Ill.Dec. 120, 368 N.E.2d 671, 674 (1977).

In this case, plaintiffs theorized that as a result of the contract breach State Farm policyholders had suffered direct damages ("specification damages"), consequential damages ("installation damages"), or both. Specification damages were intended to compensate those policyholders who received estimates specifying non-OEM replacement parts. Specification damages were calculated as the cost difference between the OEM part and the non-OEM part.

There is no question that a class member is entitled to specification damages if an inferior non-OEM part was specified and a class member paid out-of-pocket for an OEM part. A class member is also entitled to specification damages if an inferior non-OEM part was specified and the body shop provided an OEM part at no additional cost

to the class member. Why? Because the class member has not received the benefit of his bargain. The benefits received from a source wholly independent of and collateral to the breaching party do not diminish damages otherwise recoverable. See *American Fidelity Fire Insurance Co. v. General Ry. Signal Co.*, 184 Ill.App.3d 601, 617, 132 Ill.Dec. 817, 540 N.E.2d 557, 568 (1989). The collateral-source rule has been applied in contract law in Illinois in cases where there has been an element of fraud, tort, or wilfulness in breaching the contract. See *American Fidelity Fire Insurance Co.*, 184 Ill.App.3d at 617, 132 Ill.Dec. 817, 540 N.E.2d at 568; *GNP Commodities, Inc. v. Walsh Heffernan Co.*, 95 Ill.App.3d 966, 977, 51 Ill.Dec. 245, 420 N.E.2d 659, 668 (1981).

In this case there is evidence the breaching party wilfully engaged in deceptive practices that deprived the policyholder of the benefit of his bargain. State Farm cannot be relieved of its duty to pay damages for breach of contract based upon the gratuitous action of a third party that may have mitigated the damages. Allowing State Farm to avoid paying damages because an individual body shop installed a quality part rather than the inferior non-OEM part State Farm specified would contravene the collateral-source rule. It must be remembered that plaintiffs claimed that all non-OEM parts were categorically inferior. State Farm denied this claim. Plaintiffs won. We are compelled to view the evidence in the light most favorable to the verdict winner. *Quality Granite Construction Co.*, 261 Ill.App.3d 21, 198 Ill.Dec. 528, 632 N.E.2d 1139. Therefore, this group is entitled to specification damages.

The next question is whether class members who received non-OEM parts but subsequently sold their

vehicles for fair market value are entitled to specification damages. Again the answer is yes. According to plaintiffs' proofs, the damages were not of an ongoing nature; thus, the time to evaluate damages was at the time of the breach. See generally *Foster Enterprises, Inc. v. Germania Federal Savings & Loan Ass'n*, 97 Ill.App.3d 22, 31-32, 52 Ill.Dec. 303, 421 N.E.2d 1375, 1382 (1981). State Farm's promise to pay for parts "of like kind and quality" to restore the vehicle to its "pre-loss condition" was breached when it specified and paid for inferior non-OEM parts. This point is reinforced by the repeated refrain of State Farm's counsel that State Farm "does not fix cars", it merely specifies replacement parts and pays for car repairs. The fact that a class member sold his vehicle at or below the fair market value months or years later does not negate the fact that he was damaged.

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State Farm next contends that the award of installation damages was wholly speculative. State Farm argues that a class member is eligible to receive installation damages only if a non-OEM part was installed in his vehicle and he still has the vehicle. State Farm argues that in the absence of individual proofs there is no competent evidence to show which class members are eligible for installation damages. It claims that the damage calculations prepared and testified to by plaintiffs' expert were baseless in fact and speculative.

The amount of damages is ordinarily left to the jury, and its judgment should not be upset unless it appears

motivated by passion or prejudice. *Cannell v. State Farm Fire & Casualty Co.*, 25 Ill.App.3d 907, 914, 323 N.E.2d 418, 423 (1975). Damages sought to be recovered must be shown with reasonable certainty as to their nature and extent, but the amount awarded does not have to be proved with mathematical certainty. *E.J. McKernan Co. v. Gregory*, 252 Ill.App.3d 514, 541, 191 Ill.Dec. 391, 623 N.E.2d 981, 1001 (1993). The law does not require better evidence than can be reasonably obtained (*Cannell*, 25 Ill.App.3d at 914, 323 N.E.2d at 423), but the party seeking to recover bears the burden of establishing a reasonable basis for the computation of damages. *E.J. McKernan Co.*, 252 Ill.App.3d at 541, 191 Ill.Dec. 391, 623 N.E.2d at 1001.

Class-wide consequential damages, referenced as installation damages, were intended to compensate class members for the labor costs to remove a non-OEM part and to replace it with an OEM part and for a two-day rental car fee for loss of use of the vehicle during the repair process. Plaintiffs' expert, Dr. Mathur, testified that he used hours-per-job and the labor rates reflected in State Farm's own records and principles of economics to calculate the installation damages that each eligible class member sustained. In his opinion, each eligible class member sustained approximately \$276 in damages as a result of labor costs and loss of use. Dr. Mathur also testified that he estimated the number of class members eligible for installation damages based, in part, on State Farm's repair records and reinspection studies that it had done. Dr. Mathur estimated that between 50% and 92% of the damaged vehicles were repaired with non-OEM parts. He calculated a damages range based upon his estimate of

the number of class members who actually received non-OEM parts. Dr. Mathur testified to aggregate installation damages of \$1.2 billion based on 92% eligibility and \$658 million based upon a 50% eligibility. During cross-examination, Dr. Mathur admitted that his high estimate could be off by as much as a billion dollars. Apparently, State Farm's cross-examination and argument were not lost on the jury. It awarded \$212 million in installation damages, approximately one billion less than the expert's estimate.

In this issue, State Farm is questioning the validity of the concept of aggregate damages in class action litigation. State Farm suggests that extrapolation from a representative sample of class members leads to a speculative reflection of total damages. However, sampling techniques have been found to be an appropriate method for class-wide proof of damages. See 2 Newberg, *Class Actions* 350-51 (1985) (citing cases). In appropriate circumstances, it is considered feasible and reasonable to prove aggregate monetary relief for the class based upon (1) an examination of defendant's records, (2) the use of a common formula or measure of damages multiplied by the number of transactions, units, or class members involved, or (3) a reasonable approximation with proper adherence to recognized evidentiary standards. See 2 Newberg, *Class Actions* 348 (1985); *Long v. Trans World Airlines, Inc.*, 761 F.Supp. 1320, 1324 (N.D.Ill.1991), *aff'd on other grounds*, 913 F.2d 1262 (7th Cir.1990). When determining which method to use, courts must be careful to balance the opposing interests of the parties, and a defendant must be given fair opportunity to contest the validity of individual claims. See 2 Newberg, *Class Actions* 348 (1985).

Dr. Mathur's estimate of the number of class members eligible for installation damages was extrapolated from data found in State Farm's own records. Class-wide awards based upon estimates of the number of affected class members have been approved in the past, and mathematical precision has not been required. See, e.g., *Thomas v. City of Evanston*, 610 F.Supp. 422, 435-36 (N.D.Ill.1985). In this case, the trial court has reserved jurisdiction to administer and distribute damages. Class members entitled to installation damages can be identified through State Farm's data, class response forms, and other methods. Damages can then be distributed accordingly. See *Gordon*, 224 Ill.App.3d at 204-05, 166 Ill.Dec. 503, 586 N.E.2d at 467-68. We trust that the trial court, in consultation with the parties, can devise an acceptable method to manage and distribute the class-wide damages. Given the amount of the jury's award and the fact that eligible class members can be identified, we see little danger that ineligible class members will receive a share of this award.

Dr. Mathur's calculations of labor costs and rental fees were based upon economic principles and data accepted in the field. Though his calculations contain some uncertainty, we do not think that his opinions constitute sheer speculation. *E.J. McKernan Co.*, 252 Ill.App.3d at 540-41, 191 Ill.Dec. 391, 623 N.E.2d at 1001; *Oakleaf of Illinois v. Oakleaf & Associates, Inc.*, 173 Ill.App.3d 637, 649, 123 Ill.Dec. 288, 527 N.E.2d 926, 934 (1988). The jury considered the conflicting expert opinions and the evidence and awarded a sum well below plaintiffs' expert's minimum figure. There is no evidence that the award was motivated by passion or prejudice. We do not find the award to be against the manifest weight of the evidence.

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2. *Instructional Errors*

State Farm next contends that the burden-of-proof instruction and verdict forms were misleading or confusing. It claims that the verdict forms were improper because they permitted the jury to render a verdict for the class as a whole, rather than to render a separate verdict as to each class member. State Farm also claims that the burden-of-proof instruction was improper because it did not inform the jury that in order for the jury to find for plaintiff on the contract claim, the plaintiffs had to prove that each individual non-OEM part specified was of inferior quality.

The parties have the right to have the jury instructed on the issues presented, the principles of law to be applied, and the necessary facts to be proved to support its verdict. *Magna Trust Co. v. Illinois Central R. Co.*, 313 Ill.App.3d 375, 388, 245 Ill.Dec. 715, 728 N.E.2d 797, 808 (2000). Whether to give or deny an instruction is within the trial court's sound discretion. *Magna Trust Co.*, 313 Ill.App.3d at 388, 245 Ill.Dec. 715, 728 N.E.2d at 808. The standard for determining an abuse-of-discretion issue is whether, taken as a whole, the jury instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law. *Magna Trust Co.*, 313 Ill.App.3d at 388, 245 Ill.Dec. 715, 728 N.E.2d at 808.

The burden-of-proof instruction that was given is taken directly from the Illinois pattern jury instructions.

Illinois Pattern Jury Instructions, Civil, No. 700.19 (1995 ed.). The rejected burden-of-proof instruction tendered by State Farm required the jury to consider affirmative defense theories based upon consent, waiver, and satisfaction even though there was no evidence to support those theories. It is error to give an instruction not based on the evidence. *Bielicke v. Terminal R.R. Ass'n*, 291 Ill.App.3d 690, 693, 225 Ill.Dec. 685, 684 N.E.2d 160, 162 (1997). Not only was there no evidence to support the instruction, but there was not even a suggestion through an offer of proof of what evidence might be available. The issue is waived. See *Tarshes v. Lake Shore Harley Davidson*, 171 Ill.App.3d 143, 121 Ill.Dec. 88, 524 N.E.2d 1136 (1988). More significant is that the fact that the defenses identified are not true affirmative defenses, given the posture taken by State Farm in this case. While there is no question that in a proper case waiver, consent, and satisfaction may constitute affirmative defenses, such was not the case here.

Plaintiffs claimed that the specified non-OEM parts were categorically inferior. State Farm denied this at trial and continues to deny this aspect of the case. It is appropriate to consider one of our prior decisions dealing with this type of situation.

"Additionally, we are of the opinion that defendants' 'affirmative defenses' were not true affirmative defenses. A defense is of an affirmative nature if, by the raising of it, a defendant gives color to his opponent's claim and then asserts new matter by which the apparent right is defeated. (*Horst v. Morand Brothers Beverage Co.* (1968), 96 Ill.App.2d 68, 80, 237 N.E.2d 732, 738.) The instant 'affirmative defenses' were merely specific reasons to support defendants' denials of liability. These 'affirmative defenses'

neither admitted any part of plaintiff's case nor introduced any new matter which would have defeated plaintiff's contentions." *Zieger v. Manhattan Coffee Co.*, 112 Ill.App.3d 518, 533, 68 Ill.Dec. 200, 445 N.E.2d 844, 855 (1983).

State Farm is not entitled to claim that the parts are not inferior and at the same time claim that the policyholder waived any objection to the use of inferior parts. Had State Farm acknowledged either unequivocally or, in the alternative, conditionally that non-OEM parts were categorically inferior and then presented evidence that a State Farm policyholder with knowledge of the inferior condition had agreed to the use of the inferior non-OEM parts, then there would have been record support factually and legally for the instruction. This was not the case and therefore State Farm's burden-of-proof instruction was properly refused.

To preserve its objection to plaintiffs' burden-of-proof instruction, State Farm was required to clearly and specifically state the grounds for its objection and to tender a *proper* alternative instruction. See *Deal v. Byford*, 127 Ill.2d 192, 202, 130 Ill.Dec. 200, 537 N.E.2d 267, 271 (1989). State Farm has waived this issue because it did not tender a correct burden-of-proof instruction.

Thus, this claim of instructional error was waived on multiple grounds. After giving due consideration to the facts and the law, the trial court gave the pattern instructions as required by Supreme Court Rule 239(a) (177 Ill.2d R. 239(a)). Plaintiffs' theory of the breach was based upon the categorical inferiority of the non-OEM crash parts that State Farm specified on the repair estimates. Plaintiffs presented evidence that the non-OEM parts specified did not comport with the design and materials specifications

used in manufacturing original equipment parts and the preassembly treatment of materials used in non-OEM parts was deficient, leading to problems of fit, durability, quality, and appearance in aftermarket crash parts. There was sufficient evidence to support plaintiffs' theory of categorical inferiority of non-OEM parts. Accordingly the trial court's decision to give the pattern burden-of-proof instruction was not an abuse of discretion.

State Farm argues that the jury should have been required to render a separate verdict as to each class representative's claim. The form of the verdicts is a matter within the sound discretion of the trial court, and its determination thereon will not be disturbed in the absence of an abuse of that discretion. *Kennedy v. Commercial Carriers, Inc.*, 294 Ill.App.3d 34, 39, 228 Ill.Dec. 421, 689 N.E.2d 293, 296 (1997). In *Kennedy*, our colleagues in the first district determined that separate verdict forms were not required in a class action based upon a claim that the defendant had breached its equipment leases with each plaintiff and class member. *Kennedy*, 294 Ill.App.3d at 40, 228 Ill.Dec. 421, 689 N.E.2d at 297. In that case, the plaintiffs claimed a common breach and submitted damages on a class-wide basis. Separate verdict forms were not required because there were not separate causes of action based upon separate transactions, involving subclasses. *Kennedy*, 294 Ill.App.3d at 40, 228 Ill.Dec. 421, 689 N.E.2d at 297.

The record shows that this case was tried on behalf of a single class, without subclasses, on a single theory of liability in a breach-of-contract action. The case was tried on an issue common to all class members. The common issue was whether State Farm breached its contract by specifying inferior non-OEM parts. This was not a case

where the plaintiffs' representatives sought to recover damages based upon distinct demands in the same complaint. Considering the record before us and keeping in mind the objective of the class action lawsuit, we do not believe that separate verdicts as to each individual class representative were appropriate. The trial court did not abuse its discretion in giving class-wide verdict forms.

State Farm also contends that the trial court erred in failing to give a series of non-IPI instructions. The contested instructions are not Illinois pattern instructions. It is improper to give a non-IPI instruction when a pattern instruction on the same subject is available. Where a unique factual situation or point of law is presented, a nonpattern instruction may be given if it is accurate and will not have an improper effect on the jury. See *Magna Trust Co.*, 313 Ill.App.3d at 388, 245 Ill.Dec. 715, 728 N.E.2d at 808. A trial court may also give supplementary instructions to the jury to prevent confusion or to clarify an issue. *Lebrecht v. Tuli*, 130 Ill.App.3d 457, 489, 85 Ill.Dec. 517, 473 N.E.2d 1322, 1344 (1985).

Proposed Instruction No. 30 states that the jury must determine the preloss condition of the vehicle in order to determine whether a non-OEM part restored that vehicle to its preloss condition. An instruction may be given when evidence exists to support the theory of the instruction, but it is error to give an [sic] instruction not based on the evidence. *Bielicke*, 291 Ill.App.3d at 693, 225 Ill.Dec. 685, 684 N.E.2d at 162. In this case, plaintiffs' evidence showed that State Farm did not use the preloss condition as a factor in adjusting a claim and in determining what replacement part to specify. State Farm presented no evidence to suggest that preloss condition was a factor in the specification of replacement parts. As stated earlier,

because State Farm did not consider preloss condition in specifying the replacement part, the entire argument concerns an irrelevant matter. See *Marut v. Costello*, 34 Ill.2d 125, 128, 214 N.E.2d 768, 769 (1965). Since there was no evidence to support the theory of the instruction, the trial court properly refused it.

State Farm's proposed Instruction No. 26 states that the verdict must be for State Farm and against all class members if plaintiffs failed to prove that State Farm breached its contracts with each and every member of the class. Instruction Nos. 28, 28A, and 28B state that the verdict must be for State Farm if plaintiffs failed to prove that each non-OEM part was inferior to the part it replaced. Instruction Nos. 26, 28, 28A, and 28B are not neutral statements of the law. On the contrary, they are argumentative. It is not error for the court to refuse an instruction that is not a neutral statement of the law. *Gordon v. Chicago Transit Authority*, 128 Ill.App.3d 493, 501, 83 Ill.Dec. 743, 470 N.E.2d 1163, 1169 (1984). "Illinois courts follow a rule which requires jury instructions to be 'simple, brief, impartial, and free from argument' [Citation.] Argumentative instructions depart from the approved, fair[,] and impartial statement of the law in understandable language. Rather, argumentative instructions are adversarial statements highlighting favorable and unfavorable evidence with partisan overtones." *Lay v. Knapp*, 93 Ill.App.3d 855, 858-59, 49 Ill.Dec. 272, 417 N.E.2d 1099, 1101-02 (1981).

If given, these instructions would have been equivalent to directing a verdict for State Farm. Such instructions are improper. *Zieger v. Manhattan Coffee Co.*, 112 Ill.App.3d 518, 533, 68 Ill.Dec. 200, 445 N.E.2d 844, 855 (1983). The subject matter of these instructions was fully

covered by other instructions. It is improper to give an instruction if the proposition contained therein is fully covered in other instructions. *National Surety Corp. v. Fast Motor Service, Inc.*, 213 Ill.App.3d 500, 509, 157 Ill.Dec. 619, 572 N.E.2d 1083, 1089 (1991).

These instructions were improper in both form and content. In our view, the instructions given, when taken as a whole, adequately advised the jury of the law on the issues that were to be decided and were not misleading. The trial court correctly instructed the jury on the applicable law and the issues raised by the evidence. It was not an abuse of discretion to refuse State Farm's non-IPI Instruction Nos. 26, 28, 28A, and 28B.

State Farm also contends that the trial court erred in refusing to instruct the jury that the mere fact that a non-OEM part was specified in a repair estimate was not sufficient to establish State Farm's liability (State Farm's Instruction Nos. 31 and 31A), that State Farm cannot be held liable if a class member sold his car for fair market value after it was repaired with non-OEM parts (State Farm's Instruction No. 35), and that State Farm cannot be held liable if a class member had non-OEM parts specified but received OEM parts at no additional cost (State Farm's Instruction No. 33A). In our view, these are not accurate statements of the law, they are argumentative, and the trial court properly refused them. (See discussion in part IV(C)(1) of this opinion and our discussion above concerning alleged instructional error.)

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3. *Disgorgement Damages*

The trial court awarded and imposed a constructive trust on \$130 million in disgorgement damages on the consumer-fraud claims. State Farm claims that the court was not authorized to impose a constructive trust, an equitable remedy, because plaintiffs had an adequate remedy at law. State Farm also argues that the disgorgement damages were duplicative of the specification damages awarded by the jury and must be vacated.

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The trial court found that State Farm realized direct savings of \$130 million from the specification of inferior crash parts, and the court ordered that sum to be placed in the constructive trust to disgorge State Farm's unjust profits. According to the evidence, the direct-savings calculation was based upon the difference between the costs of OEM parts and non-OEM parts. Thus, the disgorgement damages award is duplicative of the specification damages award. The unjust gain was entirely disgorged through an award in the action at law. Plaintiffs are entitled to be fully compensated, but there can only be one recovery. To allow disgorgement damages would amount to double recovery. See *Stevens v. B & L Package Liquors, Inc.*, 66 Ill.App.3d 120, 22 Ill.Dec. 868, 383 N.E.2d 676 (1978); *Abbinante v. O'Connell*, 277 Ill.App.3d 1046, 214 Ill.Dec. 772, 662 N.E.2d 126 (1996). We find that the trial court erred in awarding an additional sum of \$130 million, and we reverse that portion of the judgment.

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4. *Punitive Damages*

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D. The Illinois Consumer Fraud Act Judgment

State Farm attacks the consumer-fraud judgment and claims that it should be reversed on the merits. State Farm contends that the trial court erroneously applied a preponderance-of-the-evidence standard when the correct standard is clear and convincing evidence.

Both parties correctly note that no standard of proof is set forth in the CFA and that the Illinois Supreme Court has not yet considered this issue. However, our colleagues in the first and third districts have reviewed this issue. *Cuculich v. Thomson Consumer Electronics, Inc.*, 317 Ill.App.3d 709, 717-18, 251 Ill.Dec. 1, 739 N.E.2d 934, 939-40 (2000); *Malooley v. Alice*, 251 Ill.App.3d 51, 56, 190 Ill.Dec. 396, 621 N.E.2d 265, 268-69 (1993). They have concluded that the appropriate standard of proof is a preponderance-of-the-evidence standard. The legislature has directed that the CFA be construed liberally to effect its remedial purposes. *Cuculich*, 317 Ill.App.3d at 717-18, 251 Ill.Dec. 1, 739 N.E.2d at 939-40; *Malooley*, 251 Ill.App.3d at 56, 190 Ill.Dec. 396, 621 N.E.2d at 268-69. The CFA was intended to afford a broader range of protection than the common law (*Martin*, 163 Ill.2d at 68, 205 Ill.Dec. 443, 643 N.E.2d at 751) and to curb fraudulent abuses, while eradicating deceptive and unfair business practices. *Malooley*, 251 Ill.App.3d at 56, 190 Ill.Dec. 396,

621 N.E.2d at 268. The elements necessary to establish fraud under the CFA are less stringent than elements necessary to establish common law fraud. *Eshaghi v. Hanley Dawson Cadillac Co.*, 214 Ill.App.3d 995, 1001-02, 158 Ill.Dec. 647, 574 N.E.2d 760, 764 (1991). The liberal construction accorded the CFA, coupled with the absence of a statutorily imposed clear-and-convincing-evidence standard, persuades us that the preponderance-of-the-evidence standard is appropriate. We, therefore, join our colleagues in so holding.

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State Farm claims that the CFA judgment should be reversed because the evidence was not sufficient to establish that the representations and omissions identified by the circuit court proximately caused injury to any of the class members. It also claims that the trial court's finding of liability under the CFA was against the manifest weight of the evidence because the claim was nothing more than a breach of contract.

An omission or concealment of a material fact in the conduct of trade or commerce constitutes consumer fraud. *Perona v. Volkswagen of America, Inc.*, 292 Ill.App.3d 59, 67, 225 Ill.Dec. 868, 684 N.E.2d 859, 865 (1997). Plaintiffs presented evidence that the non-OEM parts which State Farm specified were categorically inferior, that State Farm specified non-OEM parts that it knew to be inferior, that

State Farm did not inform its policyholders that the non-OEM parts it specified were inferior, and that State Farm knowingly represented on its estimates, in its "Quality Replacement Part" brochures, and through its estimators that these non-OEM parts were of equal quality or better than OEM parts. There is evidence that State Farm's material misrepresentations led numerous class members to blindly accept the non-OEM parts specified (*i.e.*, without knowledge of the inferior condition of those parts). See *Perona*, 292 Ill.App.3d at 68-69, 225 Ill.Dec. 868, 684 N.E.2d at 866-67; *Johnston v. Anchor Organization for Health Maintenance*, 250 Ill.App.3d 393, 397, 190 Ill.Dec. 268, 621 N.E.2d 137, 140-41 (1993). There is overwhelming evidence of State Farm's calculated deception of its policyholders in a deliberate disregard of its express written promises contained in the policies issued. The deceit was deliberate and universally employed for the purpose of obtaining unearned, illegitimate monetary gain. This was an ill-gotten gain, acquired at the expense of persons that trusted and relied upon State Farm for honest, fair treatment. There is an abundance of evidence to support the trial court's finding that the class members' injuries were proximately caused by State Farm's deceptive conduct.

State Farm claims that it should not have been held liable under the CFA because its representations were nothing more than statements of opinion or puffery. In our view, these representations assigned "virtues" to non-OEM parts that they did not possess. See *Totz v. Continental Du Page Acura*, 236 Ill.App.3d 891, 905, 177 Ill.Dec. 202, 602 N.E.2d 1374, 1383 (1992); *Rumford v. Countrywide Funding Corp.*, 287 Ill.App.3d 330, 336, 222 Ill.Dec. 757, 678 N.E.2d 369, 373 (1997). They are representations that a

reasonable policyholder would have interpreted as fact. The evidence of State Farm's deceptive claims practices moves this case beyond a mere contract breach. In our view, the trial court's determination that State Farm's deceptive practices violated the CFA is completely supported by the evidence in the record and is not against the manifest weight of the evidence.

E. Evidentiary & Trial Errors

State Farm first contends that the trial court committed reversible error by admitting baseless opinion testimony purporting to show the universal inferiority of non-OEM parts. State Farm contends that the court abused its discretion in permitting body shop witnesses who had no expertise in metallurgy, design, or engineering to render opinions that non-OEM replacement parts were categorically inferior to OEM replacement parts.

We have reviewed the excerpts that State Farm identified in its brief, and State Farm did not object to the testimony about which it now complains. Thus, the point is waived. See *Brown*, 83 Ill.2d at 349, 47 Ill.Dec. 332, 415 N.E.2d at 339. As explained earlier, it is not our role to comb the record to uncover possible errors. Nevertheless, given the nature of this case, we have considered the issue and find no reversible error.

Whether a witness qualifies as an expert is a question left to the sound discretion of the trial court, and the court's determination will not be disturbed absent an abuse of discretion. *National Surety Corp.*, 213 Ill.App.3d at 508, 157 Ill.Dec. 619, 572 N.E.2d at 1088. A witness may be qualified as an expert based upon his knowledge, skill, experience, training, or education. *National Surety*

Corp., 213 Ill.App.3d at 508, 157 Ill.Dec. 619, 572 N.E.2d at 1088. A witness whose knowledge is based on practical experience is no less an expert than one who possesses particular academic or scientific knowledge, and each may be qualified as an expert once it is shown that he possesses specialized knowledge beyond that of the average person and that his testimony will assist the jury in deciding fact issues in the case. *Cannell*, 25 Ill.App.3d at 913, 323 N.E.2d at 423.

Each of the body shop witnesses had worked in the auto repair industry for a number of years. Each had worked with the non-OEM crash parts that State Farm specified. Over the course of those years, each had formed opinions about the quality, fit, corrosion resistance, strength, and stability of those parts based upon his hands-on experience with those parts. These witnesses were not experts in the field of metallurgy or engineering, nor did they hold themselves out as such. Each demonstrated specialized knowledge about a factual issue in the case based upon years of observations and experience in the auto repair trade. The fact that these witnesses may not be able to explain scientifically why these parts are inferior does not preclude them from rendering opinions based upon their practical experiences installing non-OEM parts. In our view, a proper foundation was laid for each of the body shop witnesses to offer an opinion about the quality and fit of non-OEM parts. State Farm had an adequate opportunity to and did vigorously cross-examine these witnesses about their qualifications and biases. It was up to the jury to determine the credibility of the witnesses and what weight, if any, to give their opinions. *Falkenbury v. Elder Cadillac, Inc.*, 109 Ill.App.3d 11, 18, 64 Ill.Dec. 628, 440 N.E.2d 180, 186 (1982).

State Farm next contends that the trial court erred in permitting one of the body shop witnesses to rely upon automotive manufacturer publications, a Consumer Reports publication, and a videotape documenting a bumper-impact test discussed in the Consumer Reports publication because they are not the types of materials reasonably relied on by experts in the auto body repair industry. The trial court has discretion to determine whether the underlying facts or data on which an expert bases an opinion are of a type reasonably relied upon by experts in that field. *City of Chicago v. Anthony*, 136 Ill.2d 169, 186, 144 Ill.Dec. 93, 554 N.E.2d 1381, 1389 (1990); *Yates v. Chicago National League Ball Club, Inc.*, 230 Ill.App.3d 472, 485, 172 Ill.Dec. 209, 595 N.E.2d 570 (1992). It is common practice and completely proper to allow experts to rely upon a trade journal or a publication as the basis for an opinion. See *Rivera v. Rockford Machine & Tool Co.*, 1 Ill.App.3d 641, 274 N.E.2d 828 (1971). An expert may disclose the underlying facts and conclusions for the limited purpose of explaining the basis for his opinion. *People v. Nieves*, 193 Ill.2d 513, 251 Ill.Dec. 155, 739 N.E.2d 1277 (2000). The publications discussed and critically analyzed the use, quality, and condition of aftermarket replacement parts. The trial court reviewed the material and determined that these publications were of a type used by persons in the auto body repair trade and were reasonably reliable. Given this record, we cannot say that the court's decision was an abuse of discretion.

State Farm claims that the trial court erred in permitting one of plaintiff's experts to play a section of a videotape demonstrating a bumper-impact test that was discussed in the Consumer Reports article and to use the Consumer Reports information during the cross-examination of one of

its expert witnesses. The record reveals that the videotape was played after one of plaintiffs' auto body mechanic witnesses testified that his opinions about the inferiority of non-OEM parts were based on his first-hand experience working with non-OEM parts and his review of the Consumer Reports article, the videotape, and other trade publications.

An expert may disclose the underlying facts and conclusions for the purpose of explaining the basis for his opinion and conclusion. *Nieves*, 193 Ill.2d at 527-28, 251 Ill.Dec. 155, 739 N.E.2d at 1284. Absent a full explanation of the expert's reasons, including the underlying facts and opinions, the jury has no way to evaluate the testimony. *People v. Anderson*, 113 Ill.2d 1, 11, 99 Ill.Dec. 104, 495 N.E.2d 485, 488-89 (1986). In *Kochan v. Owens-Corning Fiberglass Corp.*, we held that the trial court properly permitted a physician to summarize and quote from medical and industrial articles upon which he based his opinion. *Kochan v. Owens-Corning Fiberglass Corp.*, 242 Ill.App.3d 781, 804-05, 182 Ill.Dec. 814, 610 N.E.2d 683, 689 (1993). However, we noted that the information was not admitted as substantive evidence and the expert was not using the information to bolster his opinion by showing that other experts agreed with him. *Kochan*, 242 Ill.App.3d at 804, 182 Ill.Dec. 814, 610 N.E.2d at 689.

In our view, this witness used the Consumer Reports material as a basis for his opinion. There is no evidence that he was using the material to bolster his opinion. The trial court gave a limiting instruction advising the jury to consider the information not for the truth of the matters asserted but to evaluate the expert's opinion. The court need not permit the expert to recite this underlying information when its probative value pales beside its

likely prejudicial impact or its tendency to create confusion. *Anderson*, 113 Ill.2d at 12, 99 Ill.Dec. 104, 495 N.E.2d at 490. The trial court had a chance to review the videotape before the witness testified, and the court determined that its probative value in explaining the expert's opinion outweighed its prejudicial impact. See *Anderson*, 113 Ill.2d at 12, 99 Ill.Dec. 104, 495 N.E.2d at 490. While it may appear that permitting the use of the videotape takes us a step beyond permitting an expert to give a detailed summary of medical and industry reports which formed the basis of his opinions, we do not find that to be the case on these particular facts. In this case, the videotape was brief. It depicted the results of a bumper-impact test upon which plaintiffs' expert relied. Given the fact that this witness lacked extensive formal education and was not a professional witness, the trial court may have determined that playing the video would have been less prejudicial than permitting the witness to attempt to summarize the content of the video in his own words. On the basis of this record, we cannot say that the trial court abused its discretion in permitting the videotape to be played for the exclusive purpose of establishing the basis for the expert's opinion.

State Farm next claims that the trial court abused its discretion in allowing plaintiffs' engineering experts to "offer a variety of overblown generalizations" about non-OEM parts.

Plaintiffs presented an expert in industrial engineering and an expert in metallurgy and materials sciences. Each of the experts was properly qualified. Each discussed the methodology utilized to reach his respective opinions and conclusions. One expert conducted testing on a sample of the non-OEM parts. The other had observed the manufacturing process used in making non-OEM parts at a

plant in Taiwan. The experts reviewed State Farm and CAPA data and documents referencing problems encountered during the process of the manufacturing of non-OEM parts, quality-control issues, and the overall quality of the non-OEM parts being produced. Each expert rendered opinions about the flaws in the design and the manufacturing process of the non-OEM parts at issue in this case and concluded that these parts were categorically inferior. State Farm has not shown that the experts were unqualified or that the methodology was not accepted in the relevant scientific community. The validity of their opinions and conclusions are matters of weight, not admissibility. See *Temesvary v. Houdek*, 301 Ill.App.3d 560, 568, 234 Ill.Dec. 752, 703 N.E.2d 613, 618 (1998). Allowing the testimony was within the court's discretion, and we find no abuse of that discretion. State Farm also challenges, as inadmissible hearsay, the admissibility of a statistical marketing survey. A survey that adheres to generally accepted survey principles and statistical principles is generally deemed admissible, and any technical inadequacies go to its evidentiary value. See *Antry v. Illinois Educational Labor Relations Board*, 195 Ill.App.3d 221, 265, 141 Ill.Dec. 945, 552 N.E.2d 313, 340 (1990). State Farm did not challenge the statistical validity of the results or the manner of the survey. Therefore, we cannot say that the trial court abused its discretion in admitting the survey evidence.

State Farm next claims that it was not permitted to call insurance regulators of various states to testify about the quality of non-OEM parts. In its brief, State Farm does not refer us to any place in the record demonstrating that it made an offer of proof regarding the qualifications of these witnesses and the evidence each would provide.

Therefore, we must conclude that no such offer was made. In the absence of some record outlining the testimony these witnesses were expected to provide, we have no way to determine whether the exclusion of the evidence was prejudicial. *Carlson v. City Construction Co.*, 239 Ill.App.3d 211, 238, 179 Ill.Dec. 568, 606 N.E.2d 400, 417 (1992). The issue is waived.

State Farm also claims that the trial court erred in permitting plaintiffs to introduce "perception" evidence. This argument is not supported by any authority and does not meet the requirements of Supreme Court Rule 341(e)(7) (155 Ill.2d R. 341(e)(7)). See *In re Marriage of Drummond*, 156 Ill.App.3d 672, 684, 109 Ill.Dec. 46, 509 N.E.2d 707, 716 (1987). Nevertheless, we have reviewed the argument and find no prejudicial error. The record reveals that plaintiffs offered several opinion witnesses, including a professional market researcher, a professional auto sales manager with experience appraising used cars, and a professor of marketing and consumer information from Duke University, who testified that items perceived to be of inferior quality will be worth less in the marketplace. State Farm presented a number of opinion witnesses, including a professor from the Virginia Commonwealth University and a number of professional auto auctioneers, to counter plaintiffs' evidence.

Evidence should be admitted if it is material or relevant. *Kirkham v. Will*, 311 Ill.App.3d 787, 795, 244 Ill.Dec. 174, 724 N.E.2d 1062, 1068 (2000). The trial court determined that the evidence was probative of whether plaintiffs were damaged as a result of the installation of inferior parts. The determination of what is relevant is a matter within the sound discretion of the trial court and will not be disturbed on review absent an abuse of discretion.

Kirkham, 311 Ill.App.3d at 795, 244 Ill.Dec. 174, 724 N.E.2d at 1068. State Farm has failed to demonstrate that the admission of this evidence was an abuse of discretion and has failed to demonstrate how it was prejudiced by the admission of such evidence.

State Farm asserts that the trial court erred in admitting the testimony of two former insurance regulators, Timothy Ryles and Robert Hunter. State Farm contends that the trial court permitted the witnesses to testify about the inferior quality of non-OEM parts, matters it claims were outside the area of their expertise.

Whether a witness qualifies as an expert is a question left to the sound discretion of the trial court, and the court's determination will not be disturbed absent an abuse of discretion. *National Surety Corp.*, 213 Ill.App.3d at 508, 157 Ill.Dec. 619, 572 N.E.2d at 1088. The record reveals that Mr. Ryles testified that his area of expertise is insurance industry custom and practice and includes the interpretation and implementation of contracts. He reviewed a number of documents, including State Farm's own documents referencing its practice of using non-OEM parts and its knowledge of the quality of those parts. Relying upon those documents and his knowledge and experience in the operations of insurance industry, he critiqued State Farm's policy and claims practices regarding the specification of non-OEM parts in light of its insurance contract, its guarantee, and the general practice in the insurance industry. Mr. Hunter testified that his area of expertise is in casualty actuarial issues and public policy matters dealing with consumers and insurance claims issues. Relying upon a review of State Farm documents and his knowledge and experience in insurance claims practices, he critiqued State Farm's policy and

claims practices of specifying "quality replacement parts" it knew to be inferior. Any conclusions regarding the quality of non-OEM parts was expressed by these experts in the context of a discussion of claims practices in the insurance industry. Considering the background and experience of each of these witnesses, we cannot say that either was unqualified to render the opinions offered.

State Farm also claims that it was improper to permit these witnesses to merely "interpret" its documents when those documents were neither technical nor complex. It is not improper for an expert to explain a term or a practice when such subjects are beyond the knowledge and the experience of the average juror. See *American College of Surgeons v. Lumbermens Mutual Casualty Co.*, 142 Ill.App.3d 680, 701, 96 Ill.Dec. 719, 491 N.E.2d 1179, 1194 (1986). Here, Mr. Ryles and Mr. Hunter identified documents upon which they relied to form opinions in this case. In so doing, they explained the significance or meaning of a particular document or practice as it related to the opinions being offered. An expert may disclose the underlying facts and conclusions for the purpose of explaining the basis for his opinion and conclusion. *Nieves*, 193 Ill.2d at 527-28, 251 Ill.Dec. 155, 739 N.E.2d at 1284. Absent a full explanation of the expert's reasons, including the underlying facts and opinions, the jury has no way to evaluate the testimony. *People v. Anderson*, 113 Ill.2d 1, 11, 99 Ill.Dec. 104, 495 N.E.2d 485, 488-89 (1986). The trial court did not abuse its discretion in allowing each expert to identify those documents that formed the basis for his opinions and to explain their significance to the jury.

State Farm contends that the trial court erred in allowing plaintiffs to show a videotape depicting the

comparative results of a salt-spray corrosion test on an non-OEM fender and a fender manufactured by the Ford Motor Company. State Farm contends that the video was irrelevant to any issue because there was no evidence to show that this type of non-OEM fender had been installed on a policyholder's car during the class period and no evidence to show that the testing had been fairly conducted.

The videotape was presented during the evidence deposition of John Reinholz, an employee of the Ford Motor Company. Mr. Reinholz performed this test and explained how the test was performed. He testified that the test was performed in 1986 or 1987, and he authenticated the content of the videotape. Another Ford employee, Gary Balint, also testified by evidence deposition. He stated that he had asked Ford Central Laboratories to conduct a corrosion test of Ford sheet metal parts and non-OEM sheet metal parts. He explained how the testing was performed. He testified that he inspected the parts before the test began to ensure that there was no preexisting damage. He monitored the testing procedure and inspected both parts after the test was completed. Mr. Balint stated that the test was conducted in 1987 and that the non-OEM parts used were made for a 1986 vehicle. He authenticated the contents of the videotape and explained how the video was made.

According to the record, the videotape was used as a piece of demonstrative circumstantial evidence. Videotapes may be admitted into evidence when properly authenticated and relevant either to illustrate or corroborate the testimony of a witness or to act as probative evidence of what the videotape depicts. *People v. Smith*, 152 Ill.2d 229, 178 Ill.Dec. 335, 604 N.E.2d 858 (1992); *Glassman v. St.*

Joseph Hospital, 259 Ill.App.3d 730, 755, 197 Ill.Dec. 727, 631 N.E.2d 1186, 1204 (1994). The decision on whether to admit or exclude this evidence is reserved to the sound discretion of the trial court, and a court's ruling will not be reversed in absence of a clear showing of abuse. *Montag v. Board of Education, School District No. 40, Rock Island County*, 112 Ill.App.3d 1039, 1047, 68 Ill.Dec. 565, 446 N.E.2d 299, 304 (1983). In this case, two witnesses who had participated in the testing stated that the videotape fairly and accurately depicted the test and result. Mr. Balint explained how the test was performed. He also explained how the photography and videotaping was done to ensure a fair and accurate representation. A proper foundation was established. See *Missouri Portland Cement Co. v. United Cement, Lime, Gypsum & Allied Workers International Union*, 145 Ill.App.3d 1023, 1029, 99 Ill.Dec. 796, 496 N.E.2d 489, 492 (1986).

We also find that the content of the videotape was demonstrative of the corrosion-testing process and the type of damage that can result when a part is not galvanized. The jurors heard extensive testimony about corrosion testing, galvanization, and the use of testing standards to assess the quality of OEM and non-OEM parts. This video provided the jurors a chance to see how corrosion testing is performed. During the cross-examination of Mr. Balint, the jury was informed that this testing was a demonstrative exhibit for litigation purposes. The testing was conducted in 1987 during the designated class period and thus was not too remote in time. See *Glassman*, 259 Ill.App.3d at 755, 197 Ill.Dec. 727, 631 N.E.2d at 1204; *Montag*, 112 Ill.App.3d at 1047, 68 Ill.Dec. 565, 446 N.E.2d at 304. State Farm did not object to the testimony or the video on the basis that the

date of manufacture of the aftermarket part had not been established at the time these depositions were taken. Had the objection been made at the time of the depositions, the ground for objection may have been corrected. Where the basis of an objection is curable if presented during the deposition, the failure to object at that time waives the objection. 134 Ill.2d R. 211(c)(1); *Lundell v. Citrano*, 129 Ill.App.3d 390, 397-98, 84 Ill.Dec. 581, 472 N.E.2d 541, 546-47 (1984). State Farm waived this objection. We find no clear abuse of discretion in permitting the jurors to view this videotape.

State Farm also claims that plaintiffs were permitted to offer evidence and to argue that State Farm had a policy of discriminating against members of the lower class and minorities, thereby impugning State Farm's character. After reviewing the excerpts complained of, we find that State Farm has overstated the case. The trial testimony indicated that the practice of specifying non-OEM parts did not apply to State Farm employees, "special customers", and associates of State Farm executives. Considering this evidence, along with the other evidence in the case, it is reasonable to infer that this exemption was provided to "friends of State Farm" because it knew non-OEM parts were of inferior quality. The court gave a limiting instruction in which it informed the jury that this evidence could create an inference, if they chose to draw it, that non-OEM parts were inferior. The court felt that the jury was intelligent and was capable of following its instructions.

State Farm has also directed us to comments made by plaintiffs' counsel during closing argument that it claims were prejudicial and improper. Upon a review of the record, we note that State Farm did not object to those statements. Thus, it has waived those objections. See

Zoerner v. Iwan, 250 Ill.App.3d 576, 189 Ill.Dec. 191, 619 N.E.2d 892 (1993). Nevertheless, our review of the statements shows them to be within the court's limiting instruction. The trial court is in a superior position to observe the impact of alleged misconduct on the jury, and it is within the sound discretion of the trial court to determine whether the remarks and conduct of counsel interfered with the right to a fair trial. *Fultz v. Peart*, 144 Ill.App.3d 364, 380, 98 Ill.Dec. 285, 494 N.E.2d 212, 224 (1986); *Reynolds v. Alton & Southern Ry. Co.*, 115 Ill.App.3d 88, 99, 70 Ill.Dec. 929, 450 N.E.2d 402, 411 (1983). On this record, we find no abuse of discretion.

[The preceding text is nonpublishable under Supreme Court Rule 23.]

*****END OF UNPUBLISHED TEXT*****

Accordingly, the award of disgorgement damages is reversed. In all other respects, the judgment of the circuit court is affirmed, and the cause is remanded for further proceedings.

Affirmed in part and reversed in part; cause remanded.

WELCH, THOMAS M., and WELCH, ROBERT L.¹, JJ., concur.

¹ Chief Judge of the Eighth Judicial Circuit, sitting by assignment.

IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

MICHAEL E. AVERY, et al,)	
On Behalf of Themselves and)	
All Others Similarly Situated,)	
Plaintiffs,)	
vs.	)	NO. 97-L-114
STATE FARM MUTUAL)	
AUTOMOBILE INSURANCE)	
COMPANY,)	
Defendant.)	

JUDGMENT

COUNT I

(Filed Oct. 8, 1999)

The court hereby enters judgment on the jury verdict on Count I of the Third Amended Class Action Complaint, for breach of contract, in favor of the plaintiff class and against State Farm Mutual Automobile Insurance Company, in the amount of \$243,740,000.00 for class-wide Specification/Direct Damages and \$212,440,000.00 for class-wide Installation Damages, and \$456,180.00 for interest from October 4, 1999 to October 8, 1999 for a total Judgment of \$456,636,180.00 for breach of contract damages and interest accruing between the date the verdict was returned and the date of entry of this Judgment, plus costs of suit to be taxed.

The plaintiff class, certified by this court pursuant to 735 ILCS 5/2-801 *et seq.*, on December 5, 1997, and Amendment To Order on February 11, 1998, is defined as:

All persons in the United States, except those residing in Arkansas and Tennessee, who, between July 28, 1987, and February 24, 1998, (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts" installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

Pursuant to 735 ILCS 5/2-805, this Judgment shall be binding on all class members except those persons listed on Exhibit "A" hereto, who have been properly excluded from the class under 735 ILCS 5/2-804(b).

This court reserves continuing jurisdiction over the entirety of the plaintiff class and State Farm to administer and distribute the common fund resulting from this Judgment among class members, based upon appropriate proof of class membership and claims, to be obtained insofar as is practicable from the records of State Farm,

and augmented, if and as necessary, by documents and information from class members and their vehicles.

This court reserves continuing jurisdiction over the common fund resulting from this Judgment to consider and award attorneys' fees and costs to class counsel utilizing the fee award criteria and methodology authorized for class actions by the Illinois Supreme Court in *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235 (1995). This determination shall be made at such time as the full extent of class counsels' efforts in creating, preserving and making the common fund available for distribution to the plaintiff class has been determined.

Entered this 8th day of October, 1999.

/s/ John Speroni
Associate Circuit Judge

Exhibit "A"

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12. Robert & Kaye Schroeder
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15. David Smilek
130 Samuel St.
Beaver Falls, PA 15010
-

IN THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT
WILLIAMSON COUNTY, ILLINOIS

MICHAEL E. AVERY, et al,)	
On Behalf of Themselves and)	
All Others Similarly Situated,)	
Plaintiffs,)	
vs.	)	NO. 97-L-114
STATE FARM MUTUAL)	
AUTOMOBILE INSURANCE)	
COMPANY,)	
Defendant.)	

JUDGMENT
COUNTS II AND III
(Filed Oct. 8, 1999)

Counts II and III of plaintiffs' Third Amended Class Action Complaint ("Complaint") assert claims under the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.* (hereinafter, "Consumer Fraud Act" or "Act") against defendant State Farm Mutual Automobile Insurance Company ("State Farm"). Under Illinois law, these claims must be decided by the court, not the jury. The bench trial on Counts II and III was conducted separately, but simultaneously, with the jury trial on Count I.

The Act declares unfair methods of competition and unfair or deceptive acts or practices in any trade or commerce to be unlawful. These include any fraud, misrepresentation or the concealment, suppression or omission of

any material fact, with the intent that others rely on the concealment, suppression or omission of such material fact, as well [sic] the use or employment of any practice described in Section 2 of the Uniform Deceptive Trade Practices Act, 815 ILCS 510/2. Such methods, acts or practices are unlawful whether any person has in fact been misled, deceived or damaged.

Where private individual plaintiffs bring suit under the Act, they must prove, by a preponderance of the evidence, (1) a deceptive act or practice by the defendant; and (2) defendant's intent that the plaintiffs' rely on the deception (actual reliance on the part of the plaintiffs is not required); and (3) the occurrence of the deception in the course of conduct involving trade or commerce; and (4) damage to the plaintiffs as a result of defendant's violation of the act. *Cripe v. Leiter*, 184 Ill.2d 185 (1998); *Malooley v. Alice*, 251 Ill. App. 3d 51 (3rd Dist. 1993); 850 ILCS 505/10a(a). If a violation of the Act is proven, the court may award actual economic damages and "any other relief which it deems proper". 850 ILCS 505/10a(a) and (c). In order to recover, plaintiffs must show that the violation of the Act directly and proximately caused their injury. *Martin v. Heinold*, 163 Ill.2d 33,68 (1994).

Pursuant to 735 ILCS 5/2-805, this Judgment, with respect to Counts II and III, shall be binding on all class members, as certified by the court pursuant to 735 ILCS 5/2-801 *et seq.*, on December 5, 1997, and Amendment To Order on February 11, 1998, (except those persons listed on Exhibit "A" hereto, who have been properly excluded from the class under 735 ILCS 5/2-804(b)), and who come within the following definition for the purposes of the Consumer Fraud Act claims:

All persons in the United States, except those residing in Arkansas and Tennessee, who, between July 28, 1994, and February 24, 1998, (1) were insured by a vehicle casualty insurance policy issued by Defendant State Farm and (2) made a claim for vehicle repairs pursuant to their policy and had non-factory authorized and/or non-OEM (Original Equipment Manufacturer) "crash parts" installed on their vehicles or else received monetary compensation determined in relation to the cost of such parts. Excluded from the class are employees of Defendant State Farm, its officers, its directors, its subsidiaries, or its affiliates.

In addition, the following persons are excluded from the class: (1) persons who resided or garaged their vehicles in Illinois and whose Illinois insurance policies were issued/executed prior to April 16, 1994, and (2) persons who resided in California and whose policies were issued/executed prior to September 26, 1996.

On October 4, 1999, the jury found that State Farm was liable to the plaintiffs on Count I of plaintiffs' Third Amended Class Action Complaint for breach of contract and returned a verdict in favor of Plaintiffs in the amount of \$243,740,000.00 for class-wide Specification/Direct Damages and \$212,440,000.00 for class-wide Installation Damages. The court, prior to the commencement of the jury trial on Count I, made the following determinations (which are also applicable to the court's consideration of Counts II and III):

1. That the contractual obligation of State Farm under its insurance policies is exactly the same whether State Farm promised to pay for "crash parts" of "like kind

and quality" or promised to pay for "crash parts" which restore a vehicle to its "pre-loss condition";

2. That the State Farm insurance policies allow State Farm to specify and pay for "crash parts" made by the vehicle's manufacturer (Original Equipment Manufacturer, abbreviated OEM) or "crash parts" from other sources (non-Original Equipment Manufacturer, abbreviated non-OEM) so long as the "crash parts" are of "like kind and quality" which restore the damaged vehicle to its "pre-loss condition";

3. That "crash parts" are of "like kind and quality" only if they restore a vehicle to its "pre-loss condition"; and

4. That "pre-loss condition" means the condition of the vehicle immediately before the time it is damaged.

This court has presided over this action since its inception and is familiar with the issues of fact and law it presents. This court has independently heard, read, and considered all of the admitted evidence and testimony pertinent to the Consumer Fraud Act claims, including the evidence and testimony presented to the jury on the breach of contract claim, to the extent relevant, and the evidence and testimony pertaining solely to the Consumer Fraud Act claims, that was presented to the court outside the jury's presence. This court has had the opportunity to consider the documents and materials admitted into evidence and to observe the demeanor, evaluate the credibility, and weigh the testimony of the parties' fact and opinion witnesses and the arguments of counsel.

The court, after considering all the evidence, finds, as did the jury, that State Farm did breach its contract with

the plaintiffs, that the non-OEM "crash parts" specified and used by State Farm were not of "like kind and quality" and did not restore plaintiffs' vehicles to their pre-loss condition as required by the insurance contract between State Farm and the plaintiffs. These findings do not on their own establish a violation of the Act. The court must now consider whether the evidence also establishes the elements, set forth above, which are required to prove a violation of the Consumer Fraud Act.

The plaintiffs allege, under Count II and Count III of the Third Amended Class Action Complaint, that State Farm violated the Consumer Fraud Act. The Plaintiffs allegations include, without limitation, that State Farm installed inferior non-OEM "crash parts" on the plaintiffs' vehicles when it was obligated under its insurance policies with the plaintiffs to use "crash parts" of "like kind and quality" which would restore plaintiffs' vehicles to their "pre-loss condition" and that State Farm failed to disclose to plaintiffs that it was using and paying for cheaper, inferior non-OEM "crash parts" to repair plaintiffs' vehicles.

After considering all the testimony and evidence admitted at trial, the court finds that the plaintiffs have proven that State Farm violated the Consumer Fraud Act and that none of the defenses asserted by State Farm bar plaintiffs' right to recover under the Act or reduce the amount of plaintiffs' recovery.

State Farm, prior to and during the class period for Consumer Fraud Act plaintiffs, knew that the non-OEM "crash parts" it was specifying on its policyholders' repair estimates were not of "like kind and quality" and would not restore their policyholders' vehicles to "pre-loss condition."

State Farm's knowledge of the inferiority of the non-OEM "crash parts" is clearly shown the testimony of witnesses, State Farm's own internal documents, CAPA documents (State Farm was instrumental in the creation of CAPA. CAPA's stated purpose was to certify quality non-OEM "crash parts" and State Farm officers and management served on CAPA's board prior to and during the class period for Consumer Fraud Act plaintiffs) of which State Farm had knowledge, and other documents, all of which were admitted into evidence and appear in the trial court record. Rather than telling its policyholders of the known problems with the non-OEM "crash parts," including possible safety concerns, State Farm chose to adopt and use on its estimates the misleading term "Quality Replacement Parts," and to tell its policyholders, in various written documents which were admitted into evidence, that the parts were as good, or better than, OEM parts. Further, the written disclosures stamped on or attached to the repair estimates or which were delivered with the repair estimates, did nothing to advise the State Farm policyholder of the inferiority of the parts. Finally, State Farm's "Guarantee" improperly and unfairly placed the burden of securing a quality repair on the policyholder, not State Farm.

State Farm is a mutual insurance company which operates for the benefit of its policyholders. State Farm occupies a position of trust with its policyholders, who pay the required premiums and are entitled to receive all the benefits State Farm promises to provide in its insurance contract with them. State Farm violated this trust. The court finds that State Farm, in light of its knowledge of the inferiority of non-OEM "crash parts," misrepresented, concealed, suppressed or omitted material facts concerning

the non-OEM "crash parts," with the intent that its policyholders rely upon on [sic] these deceptions, in violation of the Consumer Fraud Act. The court further finds that as a direct and proximate result of State Farm's violation of the Consumer Fraud Act, the plaintiffs were injured and incurred actual damages; namely the specification/direct damages and installation damages which occurred during the class period for Consumer Fraud Act plaintiffs.

The jury awarded \$243,740,000.00 in "Specification/Direct Damages" and \$212,440,000.00 in "Installation Damages" for the entire plaintiff class (including the Consumer Fraud Act plaintiffs) under Count I, which awards include the amounts of specification/direct damages and installation damages sustained by the Consumer Fraud Act plaintiffs. The Consumer Fraud Act plaintiffs cannot recover these damages twice and the court therefore does not award these actual damages for State Farm's violation of the Consumer Fraud Act.

Having found that the plaintiffs sustained "actual damages," the Consumer Fraud Act allows the court, in its discretion, "to award actual economic damages or any other relief which the court deems proper," 815 ILCS 505/10(a), which includes equitable relief, injunctive relief, punitive damages, reasonable attorney fees and court costs. The evidence established that during the Consumer Fraud Act class period, State Farm realized direct savings from its non-OEM practice in the amount of \$130,000,000.00. The court finds that the equitable relief of imposition of a constructive trust for the benefit of the Consumer Fraud Act plaintiffs on the \$130,000,000.00 State Farm directly saved from its non-OEM practice is an appropriate remedy for State Farm's violation of the Act. The \$130,000,000.00

in this constructive trust will be disgorged and distributed for the benefit of the Consumer Fraud Act plaintiffs.

The court has also considered whether punitive damages should be awarded for State Farm's violation of the Consumer Fraud Act. Punitive damages may be awarded when torts are committed with fraud, actual malice, deliberate violence or oppression, or when a defendant acts wilfully, or with such gross negligence as to indicate a wanton disregard of the rights of others. *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172, 186 (1978); *Martin*, 163 Ill.2d at 80-81. The court finds that State Farm's conduct and willful violations of the Consumer Fraud Act satisfy the legal requirements for the imposition of punitive damages and that punitive damages are justified and should be awarded in this case.

Punitive damages, when awarded, are in the nature of punishment and as a warning and example to deter the defendant and others from similar wrongful conduct in the future. *Kelsay*, 74 Ill.2d at 186. A court, in determining the amount of a punitive damage award, should consider the nature and enormity of the wrong, the defendant's financial status and the defendant's potential liability in other cases. *Heldenbrand v. Roadmaster Corp*, 277 Ill.App.3d 664, 674 (5th Dist 1996). The court has considered these factors and determines that an award of \$600,000,000.00 in punitive damages is appropriate.

It is clear to the court, given State Farm's strong financial condition, that State Farm can pay the substantial punitive damages awarded without affecting its ability to pay claims under any conceivable or foreseeable combination of catastrophes and disasters for which it currently provides coverage, without affecting the contractual rights

and expectations of any of State Farm's millions of policyholders and without canceling any of the insurance policies of current policyholders.

The court, under 815 ILCS 505/10a(a), also finds that declaratory relief, specifically stating the current contractual obligation of State Farm under its insurance policies is appropriate. The court hereby finds that the contractual obligation of State Farm under its insurance policies is exactly the same whether State Farm promises to pay for "crash parts" of "like kind and quality" or promises to pay for "crash parts" which restore a vehicle to its "pre-loss condition", that the State Farm insurance policies allow State Farm to specify and pay for "crash parts" made by the vehicle's manufacturer (Original Equipment Manufacturer, abbreviated OEM) or "crash parts" from other sources (non-Original Equipment Manufacturer, abbreviated non-OEM) so long as the "crash parts" are of "like kind and quality" which restore the damaged vehicle to its "pre-loss condition", that "crash parts" are of "like kind and quality" only if they restore a vehicle to its "pre-loss condition" and that "pre-loss condition" means the condition of the vehicle immediately before the time it is damaged.

The last matter which the court must consider is whether any injunctive relief, pursuant to 815 ILCS 505/10a(c), is appropriate. The requirements for injunctive relief are (1) ascertainable rights in need of protection, (2) no adequate remedy at law and (3) irreparable harm absent an injunction. *Witter v. Buchanan*, 132 Ill. App.3d 273 (1st Dist 1985). The court, after much thought, has decided that injunctive relief is not appropriate. In this case, State Farm has been ordered to pay money damages for breaching its insurance contracts and violating the

Consumer Fraud Act. Accordingly, it is clear that an adequate remedy at law is available if State Farm again breaches its insurance contracts or violates the Consumer Fraud Act or other law. Injunctive relief cannot be awarded if there is an adequate remedy at law.

Accordingly, Judgment shall be and is hereby entered in favor of the plaintiff class and against State Farm Mutual Automobile Insurance Company on Counts II and III of plaintiffs' Third Amended Class Action Complaint as follows:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That a constructive trust is imposed for the benefit of the Consumer Fraud Act plaintiffs on the \$130,000,000.00 in direct savings realized by State Farm from its non-OEM practice during the Consumer Fraud Act class period, which will be disgorged and distributed for the benefit of the Consumer Fraud Act plaintiffs.

2. That the Consumer Fraud Act plaintiffs shall recover from defendant State Farm the further sum of \$600,000,000.00 as punitive damages.

3. That the current contractual obligation of State Farm under its insurance policies is exactly the same whether State Farm promises to pay for "crash parts" of "like kind and quality" or promises to pay for "crash parts" which restore a vehicle to its "pre-loss condition", that the State Farm insurance policies allow State Farm to specify and pay for "crash parts" made by the vehicle's manufacturer (Original Equipment Manufacturer, abbreviated OEM) or "crash parts" from other sources (non-Original Equipment Manufacturer, abbreviated non-OEM) so long

as the "crash parts" are of "like kind and quality" which restore the damaged vehicle to its "pre-loss condition", that "crash parts" are of "like kind and quality" only if they restore a vehicle to its "pre-loss condition" and that "pre-loss condition" means the condition of the vehicle immediately before the time it is damaged.

4. That the court reserves continuing jurisdiction over the Consumer Fraud Act plaintiffs and State Farm to enforce all provisions of this Judgment and to administer and distribute the common fund resulting from this Judgment among Consumer Fraud Act class members, based upon appropriate proof of class membership and claims, to be obtained insofar as is practicable from the records of State Farm, and augmented, if and as necessary, by documents and information from class members and their vehicles.

5. That this court reserves continuing jurisdiction over the common fund resulting from this Judgment to consider and award attorneys' fees and costs to class counsel utilizing the fee award criteria and methodology authorized for class actions by the Illinois Supreme Court in *Brundidge v. Glendale Federal Bank, F.S.B.*, 168 Ill.2d 235 (1995). This determination shall be made at such time as the full extent of class counsels' efforts in creating, preserving and making the common fund available for distribution to the Consumer Fraud Act plaintiff class has been determined.

Entered this 8th day of October, 1999.

/s/ John Speroni
Associate Circuit Judge

App. 220

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App. 222

[SEAL]

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
SPRINGFIELD 62701

JULEANN HORNYAK
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September 26, 2005

Mr. Scott P. Nealey
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No. 91494 - Michael E. Avery et al., etc., appellees, v.
State Farm Mutual Automobile Insurance
Company, appellant. Appeal, Appellate Court,
Fifth District.

The Supreme Court today DENIED the petition for re-
hearing in the above entitled cause.

The mandate of this Court will issue to the appropriate
Appellate Court and/or Circuit Court or other agency on
October 6, 2005.

Thomas, C.J., took no part.

App. 223

[SEAL]

SUPREME COURT OF ILLINOIS
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May 20, 2005

Mr. Scott P. Nealey
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San Francisco, CA 94111-3339

In re: Michael E. Avery et al., etc., appellees, v. State
Farm Mutual Automobile Insurance Company, ap-
pellant. No. 91494

Today the following order was entered in the captioned
case:

On the Court's own motion, the order of March
16, 2005, denying the motion by appellees for
conditional non-participation, is vacated. Dis-
qualification being a decision exclusively within
the determination of the individual judge per
Rule 63, and Justice Karmeier having advised
the court that he will not disqualify himself un-
der Rule 63, the motion for conditional non-
participation of January 26, 2005, and the mo-
tion to reconsider of March 22, 2005, are denied
as moot.

App. 224

Order by the Court.

Thomas J., took no part.

Very truly yours,

/s/ Juleann Hornyak

Clerk of the Supreme
Court

CC: All Counsel of Record

App. 225

[SEAL]

SUPREME COURT OF ILLINOIS
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March 16, 2005

Ms. Elizabeth Cabraser
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San Francisco, CA 94111-3339

TODAY THE FOLLOWING ORDER WAS ENTERED:

No. 91494 - Michael E. Avery et al., etc., appellees, v.
State Farm Mutual Automobile Insurance
Company, appellant.

Motion by appellees for conditional non-
participation. Motion *denied*.

Order entered by the Court.

Thomas and Karmeier, JJ., took no part.

cc: All attorneys of Record

IN THE SUPREME COURT OF ILLINOIS

MICHAEL E. AVERY, et al.,
on behalf of themselves and
all others similarly situated,

Plaintiffs-Appellees

vs.

STATE FARM MUTUAL
AUTOMOBILE INSURANCE
COMPANY,

Defendant-Appellant

On Appeal from the
Appellate Court of Illinois
Fifth District

No. 5-99-0830

There Heard on Appeal
from the Circuit Court for
the First Judicial Circuit
Williamson County

No. 97 L-114

John Speroni,
Judge Presiding

**PLAINTIFFS-APPELLEES'
PETITION FOR REHEARING**

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I. INTRODUCTION

On August 18, 2005 this Court issued its Opinion in this case, well over two years after the case was argued on May 14, 2003. The Opinion of the Court had the four votes required by the Illinois Constitution only because the Opinion was joined by Justice Karmeier. Absent Justice Karmeier's participation, only those parts of Chief Justice McMorrow's opinion joined by the two dissenting Justices would have had the four votes required by law and hence the force of law. As a result, this case would have been remanded to the Williamson County Circuit Court for further proceedings consistent with the dissenting opinion. One cannot doubt that Justice Karmeier "cast [] the deciding vote" in this case. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

Prior to knowing that Justice Karmeier would, as has now occurred, cast the "deciding" vote, Appellees moved for non-participation of Justice Karmeier. This motion, and its accompanying factual record, laid out the extensive, and now well documented and factually undisputed contacts between then candidate Karmeier and State Farm, State Farm's amicus, and parties with an interest in the outcome of this then pending case. This included massive direct and indirect (through organizations such as JUST-PAC) financial support of his campaign. These facts, and that Justice Karmeier and his agents were aware of this then pending case and discussed the subject of this case

(Illinois class action procedures), with litigants then before this Court were never denied by State Farm in its Response.

Given this record, the decisive participation of Justice Karmeier in this case violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution and Illinois law in that: (1) this Court allowed Justice Karmeier to himself determine the non-participation motion challenging his impartiality in violation of the due process requirement that "no man can be a judge in his own case," *In re the Matter of Murchison*, 349 U.S. 133, 136 (1955), and (2) that the huge support provided to his election by State Farm and its supporters *during the pendency of this case in this Court* violates Due Process in that it "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear, and true." *Lavoie*, 475 U.S. at 825 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). Most importantly, as discussed below, "under the due process clause of the Fourteenth Amendment 'justice must satisfy the appearance of justice,'" *Lavoie*, 475 U.S. at 825 (citations omitted). Justice Karmeier's decisive participation in this case cannot satisfy that test, which requires rehearing by this Court and Justice Karmeier's recusal.

II. STATEMENT OF FACTS

As discussed more fully in their Memorandum in Support of Appellees' Conditional Motion for Non-Participation ("Non-Participation Mot.") and accompanying Supporting Record ("First Sup. Rec.") and Memorandum in Response to Appellant's Opposition to Appellees' Conditional Motion

for Non-Participation ("Response"), and its accompanying Supporting Record ("Second Sup. Rec."), which are hereby incorporated as if fully set forth herein, Plaintiffs' request for rehearing arises out of one of the nastiest and most expensive judicial races in history. Several key facts stand out.

First, the race in question happened after this Court had accepted review of this case in 2002, briefing was completed, and oral argument was heard on May 14, 2003. This case was therefore *pending* before this Court, and had been pending for over a year, at the time of the race in question and Justice Karmeier's election to this Court.

Second, at the time this case was pending, the outcome of this case had become a major issue that was widely anticipated to affect other parties facing similar litigation (including Allstate and other insurers that had also been sued over their use of non-OEM crash parts in similar suits). Enormous sums of money would be won or lost based upon the outcome of this case. As Plaintiffs earlier showed, and was not denied by State Farm, now-Justice Karmeier, his supporters Ed Murnane and Bill Shepherd, and the groups of organizations Mr. Murnane founded, including the Illinois Civil Justice League, and JUSTPAC, were well aware of the pendency of this lawsuit. *See First Sup. Rec.*, Exh. 1 ¶¶ 2-7. It is further not disputed that State Farm lawyer and lobbyist Bill Shepherd was instrumental in the foundation of these groups, and that State Farm directly provided funding to them. Mr. Murnane in particular was aware of this case, felt it was unfair and should be overturned, and then recruited Justice Karmeier to run for this Court. *Id.* at 5-6; *First Sup. Rec.*, Exh. 49.

Third, once Mr. Murnane and his State Farm-funded and supported groups had recruited Justice Karmeier to run for this Court, they supported him with massive sums of money, both directly and indirectly, in his election to this Court. For example, JUSTPAC gave Justice Karmeier a total of \$1,191,453 in donations. *Affidavit of Melinda J. Morales*, Exh. 1. The donations reasonably appear to be, and in fact were, the equivalent of direct contributions to Justice Karmeier's campaign as all but \$500 of the funds raised by JUSTPAC for 2004 election campaigns were then given to Justice Karmeier's campaign *Id.*, Exh. 2. Also notable was \$269,338 from the Illinois Chamber of Commerce, and total donations by the U.S. Chamber of Commerce of over \$1.3 million to the Republican Party, which were then in turn passed directly on to Judge Karmeier's campaign by that party. *See id.*, Exh. 1; *First Sup. Rec.*, Exhs. 30-31, 33-34. State Farm employees are Directors of both organizations, *see, e.g., First Sup. Rec.*, Exh. 31, and both donating organizations were also members of, and major supporters of JUSTPAC, and through it Justice Karmeier. *See, e.g., First Sup. Rec.*, Exh. 50.¹

Most of the funds given to Justice Karmeier's campaign cannot be fully traced beyond their source in organizations of which State Farm is a member and contributor. However, as Appellees showed, over \$350,000 of the direct donations to Justice Karmeier's campaign *can be traced* to State Farm's employees, lawyers, or amicus and lawyers

¹ As Appellees showed, huge sums of money were also directed to Justice Karmeier's campaign by three groups – the Illinois Coalition for Jobs, Growth and Prosperity (\$150,000), the American Tort Reform Association (\$415,000), and Illinois Insurance Political Committee (\$6000). State Farm was a member of and contributor to all of these groups. *See Non-Participation Mot.* at 19-22.

representing amicus in this case. See *Non-Participation Mot.*, at 11-12 and exhibits cited therein; *Second Sup. Rec.*, Exh. 6. In addition, many hundreds of thousands of dollars were given to Judge Karmeier's campaign by State Farm employees, agents, and amicus through JUSTPAC, including \$1000 given by Edward B. Rust, State Farm's Chairman and CEO. See *Non-Participation Mot.* at 13-14, *Second Sup. Rec.* at Exhs. 9-20.

Fourth, and finally, there is no doubt that the results of the race were correctly perceived by the public as an election bought by big money. On November 5, 2004, *The St. Louis Post Dispatch* (which endorsed Justice Karmeier for the Illinois Supreme Court) ran an editorial stating that "Big business won a nice return on a \$4.3 million investment in Tuesday's election. It now has a friendly justice on the Illinois Supreme Court. * * * And anyone who believes in evenhanded justice should be appalled at the spectacle of a big-money efforts to buy a Supreme Court seat." The editorial described the election as an "ugly, dispiriting, destructive, misleading, money-drenched race." The article suggests that Justice Karmeier might be tempted to "do favors for the interests that lavished millions on his campaign" and that the average citizen must be "wondering if it's payback time." *St. Louis Post Dispatch* - 11/5/04 - "Buying Justice." *First Sup. Rec.* Exh. 9.

That Justice Karmeier would cast the decisive vote in a case where he was elected *after the case was argued and submitted for decision*, and after having knowingly taken hundreds of thousands, and likely millions, of dollars directly from the parties and attorneys then before this Court and groups connected to them, cannot but be seen as a failure to satisfy the Fourteenth Amendment Due

Process Clause requirement that "the appearance of justice" must exist for a justice to be entitled to participate in a decision in a major case like this.

III. ARGUMENT

A. Justice Karmeier's Decisive Participation in the Decision of This Case Violates the Fourteenth Amendment Due Process Rights of Members of the Class

In a long series of decisions the United States Supreme Court has explored the obligation of fairness and impartiality by judges, noting that: "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness." *In re Murchison*, 349 U.S. at 136. Out of the requirement of due process comes two basic requirements for all judges: "no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." *Id.* Noting that what constituted an interest "cannot be defined with precision. Circumstances and relationships must be considered," *Id.*, the High Court has repeatedly held that "Every procedure which would offer a possible temptation to the average . . . judge . . . not to hold the balance nice, clear, and true" denies due process of law. *Id.* (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 532 (1927)); accord *Lavoie*, 475 U.S. at 825 (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)).² Nor does the Due Process

² State Farm's Response (*Opposition of Defendant Appellant State Farm Mut. Auto Ins. Co. to Plaintiffs Appellees' Conditional Mot. for Non-Participation*) at 6 implicitly recognizes this is the Due Process
(Continued on following page)

Clause of the Fourteenth Amendment require a showing of actual bias. As the High Court has noted:

Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'

In re Murchison, 349 U.S. at 136 (quoting *Offutt v. United States*, 348 U.S. 11, 14). As the High Court noted in requiring the recusal of a State Supreme Court Justice whose decision was argued to have been influenced improperly:

We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true."

Lavoie, 475 U.S. at 825 (quoting *Ward*, 409 U.S. at 60, 93 S. Ct. at 83 (quoting *Tumey v. Ohio*, *supra*, 273 U.S. at 532, 47 S. Ct. at 444)). The Due Process test is therefore not actual bias, but rather the "appearance of justice." As *Lavoie* explains:

The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But

standard at issue by citing to *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136, 75 S. Ct. at 625 (citation omitted).

Id. Because what is sufficient to disqualify a judge "cannot be defined with precision," *Lavoie*, 475 U.S. at 822 (*quoting Murchison*, 349 U.S. at 136), the United States Supreme Court has looked at all factors which might give an appearance of bias. *See, e.g., Lavoie*, 475 U.S. at 822-25; 475 U.S. at 829-30 (Brennan, J., concurring).

In applying the Due Process requirement to the facts of this case, it must be noted that Appellees do not seek rehearing solely on the basis that campaign contributions were made to Judge Karmeier. Rather, the "appearance of justice" is distorted by the (1) timing of these donations (during the pendency of this case before this Court when there was a real or reasonably assumed belief that Justice Karmeier's vote might be decisive); (2) the massive size of these donations; and (3) the specific and substantial relationship between Judge Karmeier, his election proponents, and Appellant State Farm. In similar circumstances, the Florida Supreme Court held that a \$500 donation to a judge by a party's attorneys was not sufficient in and of itself for disqualification. However, that Court indicated that larger donations, made to a "judge's judicial election campaign which was *ongoing* at the time of the underlying lawsuit" or where there was "*a specific and substantial political relationship*" were "additional factors," beyond the mere fact of a small donation, which might require recusal. *MacKenzie v. Super Bargain Stores*,

Inc., 565 So. 2d 1332, 1338 n.5 (1990) (emphasis in original).³ Such “additional” factors are in evidence here.

The court in *Pierce v. Pierce*, 39 P.3d 791 (Ok. 2002), further explored the interplay of campaign contributions and due process, and found as the *MacKenzie* Court had suggested it would:

that due process must include the right to a trial without the *appearance* of judge partiality arising from counsel’s campaign contributions and solicitation of campaign contributions on behalf of a judge during a case pending before that judge.

Pierce, 39 P.3d at 788 (emphasis in original). As Justice O’Connor has further suggested:

relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. * * * Even if judges were able to refrain

³ An additional factor requiring recusal is the harsh and very personal nature of the race between now Justice Karmeier and his opponent, then Justice Gordon Maag, who, as this Court is aware, authored the Appellate Court opinion under review by this Court. See *Non-Participation Mot.* at 3-6. The likelihood of actual bias is highlighted by the additional fact that (as State Farm points out) certain lawyers for Appellees themselves made campaign donations to the Democratic Party, donations State Farm implies were then passed on to then Justice Maag’s campaign. See *S. Ct. Rule 328 Affidavit of Theresa M. Donell* At Exh. J-K. Having conceded that donations that are then shifted through other organizations must be considered in the analysis, Plaintiffs’ donations, while irrelevant had Gordon Maag been elected (as he would have had to recuse himself as the author of the opinion under review) are relevant to the Due Process analysis as they provide further reason for the public to believe that Justice Karmeier is biased against Appellees and that it would effect his vote in this matter. See e.g. *MacKenzie v. Super Kids Bargain Store, Inc.*, *supra*, 569 So.2d at 1138-9.

from favoring donors, the mere possibility that judges' decisions may be motivated by the desire to repay campaign contributors is likely to undermine the public's confidence in the judiciary.

Republican Party of Minn. v. White, 536 U.S. 765, 790 (2002) (O'Connor, J., concurring).

Here it cannot but be doubted, and as Appellees have shown is being widely assumed by citizens of this State, that the connection between Justice Karmeier and State Farm, and the massive donations given to help elect him to this Court while this case was pending "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true." *Lavoie*, 475 U.S. at 825 (*ellipses in original*) (*quoting Ward*, 409 U.S. at 60, *quoting Tumey*, 273 U.S. at 532). As such, Appellees' Fourteenth Amendment Due Process rights have been abridged.

B. Justice Karmeier's Participation in This Case Requires That This Court Vacate Its Decision and Grant Rehearing Under S. Ct. Rule 367.

In *Lavoie*, the United States Supreme Court considered the remedy where, as here, "a disqualified judge casts the deciding vote." *Lavoie*, 475 U.S. at 828. The Court held that: "we conclude that the 'appearance of justice' will best be served by vacating the decision and remanding for further proceedings. Appellees have not contended that, upon a finding of disqualification, this disposition is improper." *Id.* Here, the same remedy is required. This Court's opinion should be vacated, and rehearing granted

under S. Ct. Rule 367, with further proceedings occurring without Justice Karmeier's participation.

C. This Court Must Address Plaintiffs' Constitutional Arguments Rather Than Allowing Judge Karmeier To Be A Judge Unto Himself

On May 20, 2005 this Court issued an order stating that:

On the Court's own motion, the order of March 16, 2005, denying the motion by appellees for conditional non-participation, is vacated. Disqualification being a decision exclusively within the determination of the individual judge per Rule 63, and Justice Karmeier having advised the Court that he will not disqualify himself under Rule 63, the motion for conditional non-participation of January 26, 2005, and the motion to reconsider of March 22, 2005, are denied as moot.

May 20, 2005 *Order*. The order stated that Justice Thomas took no part in the decision. By implication Justice Karmeier did so participate.

Appellees do not disagree with any practice of this Court under which each Justice is given the initial opportunity to determine for her or himself whether to sit on a case. If the decision is then to recuse, no provision of law can require that Justice to sit, or for this Court to overrule that decision. However, the converse proposition is not true. Once a Justice has elected not to recuse, the matter is hardly "moot": the Due Process Clause requires more, as it is beyond doubt, as a matter of Constitutional dimension, that no judge "can be a judge in his [or her] own case." *In re Murchison*, 349 U.S. at 136; *Accord. Lavoie*,

475 U.S. at 822 (quoting *In re Murchison*). Here, Justice Karmeier's impartiality has been questioned, and, having refused to recuse himself, it becomes this Court's obligation and duty to address and rule impartially on the Due Process challenge to this Court's August 18 decision without Justice Karmeier's participation. Given the procedure that occurred in this case, and which did not comply with the requirements of Due Process, this Court must grant rehearing and, after further briefing and renewed oral argument, reconsider its decision without Judge Karmeier's participation.

IV. CONCLUSION

For the foregoing reasons, this Court should find that Justice Karmeier's participation in this case violated Appellees' Fourteenth Amendment Due Process rights and their rights under Illinois law, vacate its August 18, 2005 *Opinion*, and grant rehearing of this case without Justice Karmeier's participation. Given that Justice Karmeier appears to have participated in the decision of this case and may have influenced the opinions of the members of this Court though his participation, the Court should allow further briefing and reset the case for renewed oral argument.

Dated: September 8, 2005 Respectfully submitted,

By: /s/ Scott P. Nealey
Scott P. Nealey

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**In the
Supreme Court of Illinois**

MICHAEL E. AVERY, et al.,) On appeal from the
on behalf of themselves) Appellate Court of Illinois,
and all others similarly	) Fifth Judicial District
situated,	) No. 5-99-0830 , there heard
<i>Class Plaintiffs-Appellees,</i>	) on Appeal from the Circuit
	) Court, First Judicial Circuit,
STATE FARM MUTUAL	) Williamson County, Illinois,
AUTOMOBILE	) No. 97-L-114
INSURANCE COMPANY,	) Hon - Jon Speroni,
<i>Defendant-Appellant.</i>	) Judge Presiding
)

**MEMORANDUM RESPONSE TO APPELLANT'S
OPPOSITION TO APPELLEES' CONDITIONAL
MOTION FOR NON-PARTICIPATION**

Plaintiffs-Appellees, through all of their attorneys, respectfully respond to Appellant's Opposition to Appellees' Conditional Motion for Non-Participation of Justice Lloyd Karmeier in the decision of this case.

**I. JUSTICE KARMEIER'S ACCEPTANCE OF
CAMPAIGN DONATIONS AND OTHER AS-
SISTANCE FROM INTERESTED PARTIES,
ATTORNEYS, AND WITNESSES IN A PEND-
ING CASE CREATES AN OBVIOUS APPEAR-
ANCE OF IMPROPRIETY.**

Plaintiffs reluctantly filed this motion after discovering that Justice Karmeier, likely through an oversight,

had not yet recused himself from participating in the decision of this case. Given the manifest public perception that justice before the highest court of this State may have been for sale in the most expensive and nasty judicial election in American history, Plaintiffs did not expect that State Farm would dispute that it was inappropriate for Justice Karmeier to sit in judgment on a case that was pending before this Court at the time that State Farm and its agents were working so hard to elect him. If anything, State Farm's brief simply highlights, and will certainly appear to the public to highlight, that State Farm desperately wants the candidate who it so heavily supported to sit in judgment on the pending case.

As earlier noted, the test for recusal is the appearance of impropriety, not actual bias – and State Farm's emphatic argument, including a submission from a paid expert, that after all of their extensive and far-reaching support for him that Justice Karmeier should sit in judgment of this matter – merely emphasizes what the public will perceive, if he were to participate in deciding the case that Justice Karmeier was not in fact impartial. Plaintiffs hope and believe that Justice Karmeier is well aware of how his participation would appear inappropriate should he then support State Farm, will see no need to participate in any decision, and in doing so will prevent damage to the reputation of this State's justice system.

The issue is not as Appellant attempts to pose it. This case does not involve the mere acceptance by Justice Karmeier's campaign of contributions from various individuals and entities aligned with an interested party who later appear before him. Rather, the issue is whether there is an *appearance* of impropriety based on the totality of the circumstances, including the donations and support

that occurred while this case was then pending before this Court. Contrary to State Farm's suggestion, actual bias or impropriety is not the standard. See *In re Marriage of Wheatley*, 297 Ill. App. 3d 854, 859 (5th Dist. 1998) (holding that under the totality of the circumstances as uniquely presented in the case, an appearance of impropriety was created, and the trial judge should have, under petitioner's motion, vacated his decision and recused himself from further consideration of the case).

Although any one event or issue raised by appellees may not, in and of itself, create an appearance of impropriety, the combination of the events and issues – not just the cherry-picked issues addressed in isolation by State Farm – clearly give the appearance of impropriety. This is particularly true since the events did not happen before State Farm appeared before this Court as with almost all donations, but rather while this appeal was pending. These circumstances include a judicial candidate who:

- allowed his campaign committee to accept campaign donations from the Defendant, attorneys for the Defendant, employees of the Defendant, a defense witness – the CEO and President of State Farm – who testified in the trial of the matter before the court (and whose credibility is at issue), the Defendant's lobbyists, and Amicus counsel;

- accepted thousands of dollars in contributions when a case was pending in the Illinois Supreme Court and it was likely that he might participate in the decision of the case if he did not then recuse himself;

- has and had extremely close ties with the Defendant through the individual who recruited him to run for

the Illinois Supreme Court and who essentially managed his campaign, Ed Murnane;

- discussed campaign donations and donors and suggested ways for donors to avoid public disclosure of their donations;

- did not hear oral arguments in the case or have an opportunity to have his questions answered by Plaintiffs;

- allowed negative attack ads to be run against his election opponent;

- ran for election in the most expensive judicial election in United States history – an election that received widespread media coverage uniformly remarking on the unseemliness of the campaign, the negative attack ads by both candidates, and the fact that big business had essentially purchased a seat on the Illinois Supreme Court.¹

¹ The facts Plaintiffs present to urge Justice Karmeier's recusal or disqualification go far beyond attorneys merely providing some campaign contributions to Justice Karmeier and later appearing before him. This motion involves the acceptance of campaign donations made by a witness to a case *that was pending* and which it could not be doubted Justice Karmeier knew he could hear if elected and did not recuse himself from this matter. Edward Rust, a State Farm witness gave \$1,000 to Karmeier through JUSTPAC on April 1, 2004. (Ex. 2). JUSTPAC's finding of Justice Karmeier's campaign had already been made public prior to Rust's donation to JUSTPAC. JUSTPAC funded a mailer for Justice Karmeier that cost over \$31,000 in March, 2004. (Ex. 42). Defendant has not rebutted this fact. Additionally, as previously established, JUSTPAC gave 91.5% of their contributions to Karmeier, including the \$1,000 donation from State Farm witness, Ed Rust. (See Memorandum in Support of Appellees' Conditional Motion for Non-Participation at 12-13). In the hope that this fact is lost in the shuffle, State Farm makes no effort to rebut the fact that Ed Rust's donation and almost of all of JUSTPAC's contributions went to Karmeier.

Appellees respectfully submit that the overwhelming culmination of events and issues raised by Appellees, when combined and viewed together, as they must be, and which *are being and will be viewed* by the public, demonstrate that a clear appearance of impropriety exists, and that a reasonable person would justifiably question Justice Karmeier's impartiality were he not to recuse himself from this matter.

A judge has an obligation to disqualify himself or herself in a proceeding where the judge's impartiality might reasonably be questioned. ILCS Code of Jud. Conduct, Cannon, 3, S.Ct. Rule 63(C)(1)(a). Disqualification is not limited to circumstances where there is actual bias or prejudice but is also warranted where there is an appearance of bias or prejudice. *People v. Bradshaw*, 171 Ill.App. 3d 971, 975-76 (1st Dist. 1986). Similarly, a judge must avoid all impropriety as well as the appearance of impropriety. ILCS Code of Jud. Conduct, Cannon, 2, S.Ct. Rule

The facts which are presented in support of Justice Karmeier's recusal and/or disqualification also involve a State Farm witness who was intimately connected both with the Karmeier election campaign and State Farm itself. Phillip O'Connor, a State Farm expert witness and former Insurance Director for this State (Avery Record at R9431) was on a \$10,000 a month retainer with State Farm at the time of the Avery trial. (Avery Record at R9433-34). He is also the Civil Justice Task Force Chairman for the Illinois Business Roundtable which had a major role in the Karmeier campaign. The Business Roundtable set up and funded the Illinois Civil Justice League and JUSTPAC as well as the Illinois Coalition for Jobs, Growth and Prosperity, which sent several devastating mail pieces against Judge Magg during the election. O'Connor, as the chairman of the Civil Justice Task Force for the Illinois Business Roundtable, had to be intimately involved in the Karmeier campaign through his work with the Illinois Civil Justice League, JUSTPAC, and the Illinois Coalition for Jobs, Growth and Prosperity. The point though is that public perception is one of impropriety even if, as Plaintiffs hope is the case, there is none.

62. Moreover, a judge must conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. *Id.*

Disqualification and/or recusal is required where there is an appearance of impropriety. *Pierce v. Pierce*, 39 P.2d 791 (Oklahoma 2001) (judge's impartiality might reasonably be questioned where campaign contributions were made by attorney, others associated with attorney, and where attorney further assisted judge's campaign by soliciting funds on behalf of judge during a pending case in which lawyer was appearing before judge); *Gluth Brothers Const., Inc. v. Union Nat. Bank* 192 Ill. App. 3d 649 (2d Dist. 1989) (appearance of impropriety exists when judge has present and ongoing relationship with attorney for one of parties while case is still pending). These opinions all stress the *pendency* of a matter when the contribution or other support is given. This is the situation present in the instant case – and which separates the facts in this case from most, if not all, campaign donations.

Recusal is required where a reasonable observer would think there was a significant risk that the judge will resolve the case on a basis other than the merits. *In re Nettles*, 2005 WL 120505 *2 (7th Cir., January 21, 2005), citing *Hook v. McDade*, 89 F.3d 350, 354 (7th Cir. 1996). In considering whether recusal is required, it must be kept in mind that “these outside observers are less inclined to credit judges’ impartiality and mental discipline than the judiciary itself will be.” *In re Nettles* *2.

For example, four years ago, the ABA Commission on State Judicial Selection Standards found “an alarming increase in effort by special interests to influence the outcome of judicial elections through both financial contribution

and attack campaigning." That the totality of the circumstances here suggests the appearance of impropriety looms even larger when one considers a 1998 survey sponsored by the Texas Supreme Court which found that 83% of Texas adults, 69% of court personnel, 79% of Texas attorneys and 48% of judges believed that campaign contributions influenced judicial decisions "very significantly" or "fairly significantly." Supreme Court of Texas, State Bar of Texas and Texas Office of Court Administration. *The Courts and the Legal Profession in Texas – The Insider's Perspective* (May 1999). A special commission appointed by the Pennsylvania Supreme Court found that nine out of ten voters believed that judicial decisions were influenced by large campaign contributions. Executive Summary, ABA Task Force Report on Judicial Campaign Finance, November 1988, at 2. Even if justice remains fair and unaffected, the reality of the recent supreme court election and the uncontested facts uncovered by Appellees make the appearance of impropriety unavoidable and unmistakable unless members of this Court insure that the appearance of impropriety is avoided.

Is there an appearance of impropriety when a judge permits campaign donations and other assistance from Defendant, the attorneys for Defendant, employees of Defendant, a defense witness who testified at the trial which is now before the court (and which was pending at the time the donations were accepted), Defendant's lobbyists, and Amicus Counsel? Is there an appearance of impropriety when a judge participates in a case when the judge owes his or her position, at least in part, to those before the court? To merely ask these questions is to answer them, and to answer otherwise than "yes" would shatter the public's confidence in preservation of the

integrity and/or impartiality of the judiciary of this State. Justice Karmeier consciously accepted campaign donations while he was aware that this highly publicized case was still pending and while he was aware that if elected, he would be in a position of conflict unless he were to recuse himself. State Farm could not have reasonably expected Justice Karmeier to sit on this matter and if it did then impropriety is manifest. For Justice Karmeier to sit would not promote public confidence in the integrity and impartiality of the judiciary. In fact, it would do just the opposite, especially where the decision in which the judge will be a part of involves an opinion authored by his opponent in a bitter judicial race, a verdict entered against the party which was found to have defrauded the public, and where the election campaign, itself drew national attention, brought much public criticism, and disturbed many citizens of this State. Nothing short of a litigant's right to a judiciary free of the appearance of impropriety (if not impropriety itself) is at stake here.²

² Throughout the Brief, State Farm suggests and attempts to create the impression that the Plaintiffs are disparaging Justice Karmeier's character. That is simply not the case. Rather, Plaintiffs expect, and believe, that Justice Karmeier intends to recuse himself given the obvious fact that the totality of the circumstances present in this case create the appearance of impropriety to the level where any reasonable person would doubt his impartiality. The suggestion that Plaintiffs have taken widespread media coverage out of context to secure Justice Karmeier's disqualification has no merit. A quick glance through the massive body of media coverage regarding the campaign speaks for itself. It cannot be seriously debated that the media questioned the integrity of the judicial race and supplied the public with enough of the gory details to create the appearance of impropriety in a case such as this and to cause the public to reasonably question Justice Karmeier's impartiality.

II. ADDITIONAL DEVELOPMENTS

Since Appellees filed their Conditional Motion for Non-Participation with the Illinois Supreme Court on January 26, 2005, in which they asked Justice Karmeier to either recuse himself or be removed from *Avery v. State Farm*, several further developments have occurred which lend further credence to the necessity of a recusal and/or disqualification of Justice Karmeier because of the existence of the appearance of impropriety. Each of the developments described below further the appearance here of justice for sale.

A. Illinois Civil Justice League Web-site Rids Itself of all References to Lloyd Karmeier, JUSTPAC or the 2004 Election.

On Monday, January 31, 2005, just three business days after the Appellees filed their motion asking Justice Karmeier to recuse himself and/or be disqualified from *Avery v. State Farm*, the Illinois Civil Justice League web-site eliminated any reference to Lloyd Karmeier, JUSTPAC or the 2004 election. Exhibit 3 to this Response provides several pages which depict what the Illinois Civil Justice League website looked like before January 31, 2005. (Ex. 3). On the former version of the web-site, Justice Karmeier is endorsed, funds are solicited for JUSTPAC, judicial campaigns are discussed, and JUSTPAC congratulates Justice Karmeier on his election to the Supreme Court. (Ex. 4). Not surprisingly, after the *Avery* Plaintiffs filed their motion which revealed that the Illinois Civil Justice League and JUSTPAC were in large part funded by State Farm and its agents, all of this election information disappeared, almost overnight. Coincidence? (Ex. 5).

B. Final Campaign Disclosures for the 2004 Election Lend Further Evidence of State Farm's Massive Donations to Justice Karmeier's Campaign.

The Karmeier campaign and JUSTPAC have now released their final campaign disclosure reports for the 2004 election. In addition to the donations outlined in Appellees initial submission relating to this Motion, additional donations from State Farm Employees, Attorneys for State Farm, and corporations with which State Farm conducts significant business with were revealed.

PPG Industries is a Pittsburgh, PA company which made two donations totaling \$2,500 directly to the Karmeier campaign on October 16, 2004 and on November 8, 2004. (Ex. 6). State Farm has a major interest in PPG. Public records show an excess of more than \$237,000,000 of investments in PPG. (Ex. 7). Additionally, State Farm is a major user of PPG's LYNX program for auto glass claims. (Ex. 8).

Dana Corporation is a Toledo, Ohio company which made a \$5,000 donation to JUSTPAC on October 12, 2004. (Ex. 9). Dana Corporation is a leading manufacturer of after-market auto parts (non OEM parts – the subject matter of the Avery case) for damaged cars, offering replacement parts for 95% of the world's vehicle population (Ex. 10), and thus one can only conclude that Dana Corporation is a major supplier to State Farm, the world's largest auto insurer. Ed Rust, State Farm's Chairman and CEO and Joe Magliochetti, Dana Corporation CEO, sit on the board of the Foundation for the Malcolm Balridge National Quality Award. (Ex. 11).

Numerous State Farm employees and lobbyists were disclosed as having made campaign donations to the Karmeier campaign and/or JUSTPAC. Sonya Gong, Executive Assistant to the Chairman Council for State Farm, who is described as the "lubricant that keeps State Farm's various zones and corporate offices functioning together smoothly" (Ex. 12), donated \$250 to JUSTPAC on October 13, 2004. (Ex. 13). Constance Tipsord, wife of State Farm CFO, Michael Tipsord donated \$500 to JUSTPAC on October 14, 2004. (Ex. 14). Michael Tipsord made the same donation to JUSTPAC in 2002. (Ex. 15). Charles Wright, the Senior Executive Vice President for State Farm gave \$250 to JUSTPAC on October 14, 2004. (Ex. 16). Kevin Callis, Assistant Vice President for Public Affairs for State Farm, gave \$250 to JUSTPAC on April 30, 2004. (Ex. 17). State Farm employees, Paul Crego and Henry Guenther each gave \$200 directly to Karmeier's campaign on August 31, 2004. (Ex. 18). Paul Crego is married to State Farm Vice President, Mary Crego. (Ex. 19). Jeffrey Lennard, an attorney with Sonnenschein, Nath and Rosenthal (a firm which lobbies for State Farm and which prepared an amicus brief in the *Avery* appeal before the Supreme Court), donated \$837.50 to the Karmeier campaign on November 12, 2004. (Ex. 20). These undisputed facts reveal that the Karmeier campaign accepted further campaign donations from State Farm Employees, and attorneys for counsel involved in the *Avery* appeal, while the *Avery* appeal was pending before this Court and while Justice Karmeier and State Farm was [sic] well aware that if elected and he did not recuse himself, Justice Karmeier would be in a position to partake in the decision of this then pending appeal. This gives rise to the appearance of impropriety, which requires recusal and/or disqualification.

C. The Ed Murnane Connection

Notably absent from Defendant-Appellant's opposition to this motion is any response to the affidavit of Doug Wojcieszak, which established: (1) Ed Murnane had a direct relationship with State Farm through Shepherd and Ed Rust; (2) Ed Murnane shared State Farm's disdain for the *Avery* decision; and (3) that Murnane in concert with State Farm lobbyist/attorney Bill Shepherd recruited Justice Karmeier to run for the Illinois Supreme Court and managed Justice Karmeier's campaign.

In addition to the materials previously provided and discussed regarding Ed Murnane, Plaintiffs now submits [sic] a further E-mail from Ed Murnane from July, 2000 where he says "[h]ad lunch then with our State Farm folks who are, of course, very class-action orientated these days!" (Ex. 21) (Wojcieszak Affidavit) (Ex. 1 to Plaintiffs Supporting Exhibits to this response). This E-mail is further evidence of the tight relationship between State Farm, the Civil Justice League, and Ed Murnane and State Farm's desire to impact this very case – which was then ongoing. Indeed, State Farm was talking with Murnane about *Avery* and Murnane shared State Farm's thoughts about *Avery* (that it is frivolous and should be overturned on appeal) with Doug Wojcieszak. (Wojcieszak Aff.) (Ex 1 to Plaintiffs Supporting Exhibits to Plaintiff's initial motion).

In addition to this, since the initial brief was filed by Plaintiffs, additional evidence has been discovered which reveals the substantial work that Ed Murnane, the Civil Justice League, and their surrogates did on behalf of Karmeier which did not have to be reported. The Illinois Civil Justice League paid \$200,000 to \$230,000 to run "bad judges" commercials on St. Louis television during the

spring and summer of 2004. (Ex. 22). These commercials set the stage for Justice Karmeier ads that ran later in the campaign saying that it's time for change – vote Karmeier. The Illinois Chamber and United States Chamber, both groups State Farm contributes to and appeared as Amicus for State Farm also made massive buys of television ads bashing the southern Illinois judiciary. (Ex. 23).

Interestingly, the February 1, 2005 edition of the *Belleville News Democrat* published a story about the Appellees' brief asking that Justice Karmeier recuse himself or be removed from the *Avery* ruling. The article included a quote from Ed Murnane, President of the Illinois Civil Justice League who denied that anyone would suggest that State Farm bought Justice Karmeier a seat on the Illinois Supreme Court: "State Farm has not bought a judge. Anybody who knows Judge Karmeier knows that" Murnane said. (Ex. 24). Yet Murnane had no trouble recognizing the possibility of impropriety when he earlier accused trial lawyers of attempting to buy Gordon Magg a seat on the Illinois Supreme Court. In Murnane's July 26, 2004 document entitled "*Justice for Sale II*", where Murnane stated "[s]uch a probable connection between nearly three quarters of a million dollars from a small group of personal injury lawyers and a candidate for the Illinois Supreme Court gives reason to believe these trial lawyers are actually trying to buy this Supreme Court seat to protect their goldmine in the Madison County Courthouse." (Ex. 25). It is worth mentioning that this case is before this Court after trial in a county far from Madison – a county not known for major litigation. Even Murnane's own previous statements make clear to the appearance of impropriety to the public.

To be clear, Appellees do not oppose State Farm's making campaign donations to judges. State Farm claims that Plaintiffs are proposing a "rule" disqualifying judges for accepting campaign donations. Plaintiffs propose no such rule. The Motion is limited to the unique circumstances in this case which involved *then pending matter* and massive support of the justice in question. Whether there is an appearance of impropriety is considered on a case by case basis looking at the totality of the circumstances. This case is significantly different than the typical case involving donations from parties that may appear before a judge in the future. This is a democracy, and State Farm, its employees and anyone else have the right to make these donations as citizens but in doing so they must have realized that the individual they supported could not then sit in judgment on them in a *then pending* case. State Farm has a right to make contributions, not buy itself a change in outcome in a *then pending* case. Heavily financing and supporting a candidate who will then sit on an already pending case involving the very same interest group that helped get him elected raises the appearance of impropriety.

Appellants in their opposition Brief raise "generous donations made by Plaintiffs' Illinois counsel to the campaign committees of many of the Justices of this Court, Justice Maag's campaign committee and other judges campaign committees throughout the State". (Appellant's Opposition Brief at 6, and Affidavit of Theresa M. Powell). Like State Farm and their lawyers, individuals such as Plaintiff's attorneys have the right to donate campaign money to judicial campaigns so long as the donation does not create the appearance of impropriety. Here, because donations were made to a judge who is sitting on and

hearing a case which was pending during his election, the appearance of impropriety exists because the case involves a party which was a driving force behind his campaign and election. This same appearance did not occur from past contributions. Additionally, it should be noted, the appearance of impropriety would never arise because of campaign donations to then Judge Maag because if he won, he would not have been permitted to participate in the decision of this case having authored the Fifth District Appellate Opinion in *Avery*. Contributors to Justice Maag's campaign knew that he would not sit in judgment on *Avery*, but judging from State Farm's own opposition State Farm and other contributors to Karmeier's campaign appear to have assumed and expected he would. Correcting impressions – well-founded or not – that money buys justice through the solution of recusal and/or disqualification levels the playing field and balances the scale of justice in this case, and may help to assure that the atmosphere of the judicial campaign at issue is not repeated in future elections – an outcome that would enhance the confidence and esteem in which the Illinois judiciary is held.

D. The Absence of Disclosure

Very importantly, Justice Karmeier has not disclosed to the Court or the public his ties with State Farm – and those in concert with State Farm. That in and of itself gives his participation the appearance of impropriety. There has been no disclosure here. There is not a sitting member of this Honorable Court who, when they sat as trial judges, did not go out of their way to disclose relationships and inquire about objections before they participated in a case. There is not a trial judge that did not go

out of his or her way to disclose the nature of all relationships with those who appeared before them that might be of a concern to an opponent. Trial judges make such disclosures so that their actions do not have the appearance of impropriety. That does not change in the Appellate Court and/or Supreme Court. If anything, the bar is raised. Who would not disclose and does not disclose relationships, whether they are personal, business, or sports related. Indeed, where grounds exist under which the judge's impartiality might reasonably be questioned, the judge must recuse himself. ILCS Code of Jud. Conduct, Canon S.Ct. Rule 63(C).

E. The Whole Story on Contributions from State Farm Employees

In an effort to minimize the impropriety of Karmeier's campaign accepting donations made by a party to a then pending case, State Farm, in their opposition and in the affidavit of Richard Painter, indicate that the contributions by these employees should be considered *de minimus*. (Appellant's Opposition at 13, Affidavit of Richard Painter, at 3)³. Defendant's position is contrary to common

³ The Affidavit of Richard Painter should not be considered by this Honorable Court because it completely misconstrues and misses the whole point of this motion by addressing the sole issue of "whether a justice of the Illinois Supreme Court should recuse himself from deciding a case involving a corporation if employees of and attorneys for the corporation contributed to his campaign for judicial election and/or is business or civic organizations in which the corporation is a member contributed to the Justice's judicial campaign." (Painter. Aff. at 2). Campaign contributions in and of themselves are not at issue. What is at issue is whether there is the appearance of impropriety because campaign donations were made by party and their agents who were a

(Continued on following page)

sense. That a judge's campaign would accept *any* campaign donation from *any* employee of a company which has a then pending appeal of a case that the judge, if elected, may decide, and the verdict against he [sic] defendant is worth in excess of \$1 billion dollars and then decide not to recuse strongly speaks to an appearance of impropriety. Additionally, defendant's position that State Farm employees gave only \$200 to \$250 per contribution and that their contributions are therefore *de minimus*, fails to recognize that the sum total of contributions from State Farm employees, lobbyists, and contractor companies to Karmeier's campaign and JUSTPAC (which gave over 91.5% of their contributions to Karmeier) were bundled and totaled tens of thousands of dollars, with the heaviest giving periods in Late April, late July, late August and mid-October – all while the *Avery* decision was still pending. This of course does not include indirect giving through other affiliated groups. What is the public to think? The contributions include:

- Edward B. Rust, State Farm Chairman and Chief Executive Officer and witness in *Avery* case. (\$1,000 on April 1, 2004 to JUSTPAC) (Ex. 2);
- Kim Brunner, Executive Vice President and General Counsel, State Farm. (\$250 on April 30, 2004 to Karmeier (Ex. 26);
- David Hill, State Farm Vice President and Counsel, State Farm. (\$250 on April 30, 2004 to JUSTPAC) (Ex. 27);

driving force behind the campaign and election of a judge who is sitting on and hearing a case which was pending during his election.

- Kevin Callis, Assistant VP for State Farm. (\$250 on April 30, 2004 to JUSTPAC) (Ex. 28);
- James E. Rutrough, Senior Executive Vice President and Chief Administrative Officer, State Farm. (\$250 on July 27, 2004 to JUSTPAC) (Ex. 29);
- Susan Waring, Senior Vice President and Chief Administrative Officer, State Farm Life. (\$500 on July 27, 2004 to JUSTPAC) (Ex. 30);
- Kim Brunner, State Farm Executive Vice President and General Counsel, State Farm (\$500 on July 27, 2004 to JUSTPAC) (Ex. 31);
- Proactive Strategies, State Farm Lobbyists (\$5,000 on July 29, 2004 to JUSTPAC and \$500 on October 7, 2004 to Karmeier) (Ex. 32);
- Michael Davidson, State Farm Senior Vice President (\$200 on August 31, 2004 to Karmeier) (Ex. 33);
- Stanley Ommen, State Farm President and Chief Executive Officer (\$250 on August 31, 2004 to Karmeier) (Ex. 34);
- Roger Joslin State Farm Retired Chairman of the Board (\$200 on August 31, 2004 to Karmeier) (Ex. 35);
- Paul Crego, State Farm employee and married to Mary Crego, State Farm Vice President (\$200 on August 31, 2004 to Karmeier) (Ex. 18);

- Henry Guenther, State Farm employee (\$200 on August 31, 2004 to Karmeier) (Ex. 18);
- Stephen McManus, State Farm attorney (\$250 on August 31, 2004 to Karmeier) (Ex. 36);
- Gregory Kennett wife or daughter (Christie) is a State Farm attorney (\$300 on August 31, 2004 to Karmeier) (Ex. 37);
- William King, State Farm Executive Vice President (\$500 on September 3, 2004 to JUSTPAC) (Ex. 38);
- David Hill, State Farm Vice President and Counsel, State Farm (\$300 on January 26, 2004 to JUSTPAC and \$500 on September 8, 2004 to JUSTPAC);
- Mayer, Brown, Rowe & Maw, State Farm Lobbyists and State Farm's counsel in this case (\$5,000 on October 7, 2004 to Karmeier) (Ex. 39);
- Sonnenschein, Nath & Rosenthal, State Farm Lobbyists and counsel for State Farm Amicus Allstate Insurance Co. (\$2,500 on June 5, 2004 to Karmeier and \$5,000 on October 7, 2004 to Karmeier) (Ex. 40);
- Dana Corporation, State Farm non OEM parts supplier (\$5,000 on October 12, 2004 to JUSTPAC) (Ex. 9);
- Sonya Gong, State Farm, Executive Assistant to Chairman's Council (\$250 on October 14, 2004 to JUSTPAC) (Ex. 12);

- Constance Tipsord, wife of State Farm CFO Michael Tipsord (\$500 on October 14, 2004 to JUSTPAC) (Ex. 14);
- Charles Wright, State Farm Senior Executive Vice President (\$250 on October 14, 2004 to JUSTPAC) (Ex. 41);
- PPG Industries, State Farm owns part of company (\$1,000 on November 8, 2004 to Karmeier and \$1,500 on October 16, 2004 to Karmeier) (Ex. 6);
- Jeffrey Lennard, attorney with Sonnenschein, Nath, & Rosenthan, (\$837.50 on November 12, 2004 to Karmeier) (Ex. 20);

III. WHERE A DEFENDANT AND WITNESSES IN A PENDING CASE PLAY MAJOR ROLES IN A JUDGE'S CAMPAIGN, THE APPEARANCE OF IMPROPRIETY EXISTS REQUIRING RECUSAL AND/OR DISQUALIFICATION.

Defendants take the position in their opposition that a judge is "not affirmatively obliged to disqualify himself or herself under Rule 63(c)(1) merely because a lawyer or a party appearing before the judge was a campaign contributor." (Defendants Opposition at 8). Under the facts presented, Defendant State Farm was more than a contributor – they were a major player in the Karmeier campaign, from start to finish. A review of the Affidavit of Doug Wojcieszak filed with the Plaintiffs' initial Brief establishes this fact. Appellants are unable to rebut this fact. Additionally, as established above, (*supra* at 3-4, fn. 1), Ed Rust and Philip O'Connor who were both witnesses in *Avery*, played major roles in the Karmeier campaign.

This is a distinguishing factor in this case. Campaign donations and active participation in a judicial campaign by a party in a matter then pending before the court the judge is running for automatically creates the appearance of impropriety requiring recusal and/or disqualification. In a post-election interview with Southern Illinoisan reporter, Caleb Hale, Justice Karmeier commented that "the amount of money involved and the campaign ads may be the catalysts for change [and that] [i]t's not for the court itself to address campaign rules, but hopefully it will take it upon itself to address some of the details." (Ex. 43). That time has now arisen and Plaintiffs believe that Justice Karmeier and this Honorable Court will do the right thing.

IV. THAT AVERY COULD HAVE BEEN DECIDED BEFORE JUSTICE KARMEIER WAS SWORN IN IS MOOT

Defendants attempt to skate the issue of State Farm's contributions Justice Karmeier's campaign by stating that *Avery* could have been ruled upon before Karmeier was even sworn in. (Defendant's opposition at 11). Yet, *Avery* was not decided before Justice Karmeier was sworn in. Therefore, the Defendants "if" argument fails. More importantly, the fact that State Farm had such a heavy influence on the Karmeier campaign means that the ability of Justice Karmeier to be impartial on *Avery* could be reasonably be [sic] questioned because of the appearance of the impropriety of the campaign donations made to Karmeier to get him on the very court which was then deciding the *Avery* case. The appearance of such impropriety most certainly would make a reasonable observer think that there is a significant risk that the judge will resolve the case on a basis other than the merits, given his strong

support from the interested party, as well as the attorneys for that party, the employees of that party, a witness to the case, and front groups of the party.

Similarly Appellant argues that Appellees waited too long to bring this Motion. (Appellant's Opposition at 2). As pointed out in Appellees initial motion, Appellees were surprised upon their check of the docket to find out that Justice Karmeier had not recused himself as Appellees believed he would given the totality of the circumstances.

Finally, Appellant states "the appearance of injustice would more likely arise from a recusal by Justice Karmeier at Plaintiffs instance, not from his participation in the resolution of the case." Appellees respectfully submit that the test to be applied is the appearance of impropriety, not injustice.

CONCLUSION

The heightened appearance of special treatment and favoritism here cannot be swept under the proverbial rug. Too much has happened in this campaign for a reasonable person to view participation in the decision of this appeal as desirable or proper. Instead, the reasonable person would view participation by Justice Karmeier in the decision of this appeal as business as usual in Illinois. As established above and in the Appellees' Conditional Motion for Non-Participation and Memorandum in support thereof, the totality of circumstances clearly establish that there is an appearance of impropriety as a result of Justice Karmeier being recruited by Ed Murnane, a known agent of State Farm and Justice Karmeier's campaign accepting hundreds of thousands of dollars in donations directly and/or indirectly from State Farm, its legal representatives,

witness, amici, and employees, while a decision in this case was pending. The public is aware that Justice Karmeier, during the campaign, discussed the identities of contributors to his campaign and the amounts they gave with his campaign committee. If Justice Karmeier participates in this matter, he would be evaluating a decision of his opponent in the most expensive Judicial campaign in Illinois history – an election that was described at best as “vicious,” and “nasty.” More importantly, he would be evaluating a decision which involves individuals, attorneys, a witness and a Defendant who have significantly contributed to his campaign while the case which he would rule on was then pending. Under the circumstances a reasonable person would question Justice Karmeier’s impartiality, would assume that Justice Karmier knows of the potential for the appearance of impropriety and bias, and would see any vote by him for State Farm as having been bought by State Farm. For the foregoing reasons, Plaintiffs respectfully request that Justice Karmeier recuse himself, and that if he elects not to do so that he be disqualified from hearing this case pursuant to Illinois Supreme Court Rule 63(c).

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App. 264

No. 91494

IN THE
SUPREME COURT OF ILLINOIS

MICHAEL E. AVERY, et al., on) On Appeal from the
behalf of themselves and all	) Appellate Court of
others similarly situated;	) Illinois, Fifth District
Plaintiffs-Appellees,	) No. 5-99-0830
vs.	) There Heard on Appeal
STATE FARM MUTUAL	) from the Circuit Court
AUTOMOBILE INSURANCE	) for the First Judicial
COMPANY,	) Circuit, Williamson
Defendant-Appellant.	) County
	) No. 97-L-114
	) John Speroni,
	Judge Presiding

OPPOSITION OF DEFENDANT-APPELLANT STATE
FARM MUTUAL AUTOMOBILE INSURANCE COM-
PANY TO PLAINTIFFS-APPELLEES' CONDITIONAL
MOTION FOR NON-PARTICIPATION

Defendant-Appellant State Farm Mutual Automobile Insurance Company ("State Farm") respectfully submits this opposition to Plaintiffs-Appellees' Conditional Motion For Non-Participation of Hon. Lloyd Karmeier, filed January 26, 2005, and served upon Defendant-Appellant by mail. In support of this opposition, State Farm states as follows:

1. Plaintiffs in their moving papers have entirely failed to show any basis for disqualifying Justice Karmeier

from participating in the decision in this case.¹ Under Illinois law, a judge is required to disqualify himself "in a proceeding in which the judge's impartiality might reasonably be questioned." Ill. Code of Judicial Conduct, Canon 3, S. Ct. Rule 63(C)(1). This Court has emphasized, however, that "[d]isqualification of a judge is not a decision to be made lightly." *People v. Jackson*, 205 Ill.2d 247, 276, 793 N.E.2d 1, 19 (2001) (citing cases). "A judge is presumed to be impartial even after extreme provocation." *Id.* Moreover, to the extent Plaintiffs raise due process arguments, it is settled that "'[o]nly under the most extreme cases would disqualification for bias or prejudice be constitutionally required.'" *Id.* (quoting *People v. Coleman*, 168 Ill. 2d 509, 541, 660 N.E.2d 919, 936 (1995)).

2. As a matter of Illinois law and policy, neither the fact that Justice Karmeier was not present at oral argument nor Plaintiffs' allegations regarding contributions to Justice Karmeier's election campaign provide any basis for recusal. Plaintiffs' other allegations concerning Justice Karmeier's campaign also fail to raise any reasonable question as to his impartiality in this case.²

¹ Plaintiffs' motion to disqualify Justice Karmeier is made only through their California attorneys, Lieff, Cabraser, Heimann & Bernstein, LLP. See PL Mot. at 1 None of the Illinois law firms and attorneys representing Plaintiffs in this case have joined in the making of this motion.

² Plaintiffs have made their motion more than two months after Justice Karmeier's election and nearly two months after his taking office. As evidenced by Plaintiffs' exhibits, Justice Karmeier's election campaign was extensively covered in the media, and the alleged bases for Plaintiffs' motion were publicly known as far back as the summer of 2004. Plaintiffs' lack of promptness in moving to disqualify Justice Karmeier underscores the inappropriateness of their motion. Cf. *Federal Deposit Ins. Co. v. O'Malley*, 163 Ill. 2d 130, 140-41, 643 N.E.2d

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3. The people of the State of Illinois by their Constitution have determined that Supreme Court Justices should be selected in partisan elections. The Illinois Code of Judicial Conduct, the Illinois Disciplinary Rules, the Illinois Judicial Ethics Committee, and the Illinois State Bar Association, as well as courts around the country, have rejected the contention put forth by Plaintiffs' counsel here that contributions to a judge's campaign committee from lawyers or litigants create bias necessitating recusal or the appearance of impropriety. If a judge cannot sit on a case in which a contributing lawyer or litigant is involved, judges who have been elected to this Court as well as other courts would have to recuse themselves in perhaps a majority of cases filed. This is not and should not be – countenanced. Justice Karmeier is neither ethically nor constitutionally required to recuse himself in this case.

**Justice Karmeier's Absence from
Oral Argument Does Not Warrant
His Non-Participation in this Case**

4. Plaintiffs first complain that it is somehow improper for Justice Katmeier to take part in the decision of this case because oral argument occurred before he joined the Court. *See* Pl. Mot. ¶¶ 1-2. It is a longstanding custom of this Court for new Justices to take part in cases argued before their swearing in. The reasons for this custom are obvious and compelling. Were it otherwise, the number of decisions decided by less than the full bench would be greatly increased, which in turn would increase the

825, 830 (1994) (emphasizing that recusal motions should be made promptly).

likelihood of cases where "the constitutionally required concurrence of four judges" would not be achieved. *Cf. Getschow v. Commonwealth Edison Co.*, 99 Ill. 2d 528, 528, 459 N.E.2d 1332, 1332 (1984) (letting stand a portion of the appellate court's decision where one justice recused himself and others were evenly divided). This Court takes cases, such as the present action, because they are significant and of public importance. *See* S. Ct. Rule 315(a). Thus, it is important that as many Justices as possible take part in decisions and provide authoritative guidance on the issues and questions before the Court. Accordingly, the custom that a newly elected Justice should participate in matters already pending before the Court is necessary and proper. The strong public policy reasons that favor the participation of new Justices in pending cases also counsel the Justices of this Court to be wary of recusing themselves without sufficient reason.³

5. In this case, the appearance of injustice would more likely arise from a recusal by Justice Karmeier at Plaintiffs' instance, not from his participation in the

³ *Cf. Cheney v. United States District Court for the District of Columbia*, 124 S. Ct. 1391, 1394 (2004) (Scalia, J.) (rejecting party's suggestion to "resolve any doubts in favor of recusal;" stating "[t]hat might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: the Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case."); *Roe v. Mobile County Appointment Bd.*, 676 So. 2d 1206, 1233 (Ala. 1995) (rejecting recusal of Alabama Supreme Court justices on the basis of campaign contributions; stating that as judges elected to serve as a court of last resort, their participation in deciding an important case was a necessary part of their "judicial function"), *overruled on other grounds by Williamson v. Indianapolis Life Ins. Co.*, 741 So. 2d 1057 (Ala. 1999).

resolution of this case. Recusal by Justice Karmeier, after Justice Thomas's earlier recusal, could result in a less than four Justice majority and no authoritative opinion on the significant legal and constitutional issues presented by this case. These issues are important not only to State Farm – which could effectively be deprived of its opportunity to present its appeal to this Court – but to the Illinois system of justice, the citizens of Illinois, and the country as a whole. See Brief of Defendant-Appellant at 16-21.

6. Plaintiffs' contention that, because he was not present at oral argument, Justice Karmeier's participation in this case would somehow offend due process and "be highly deleterious to the entire judicial process" (Pl. Mot. ¶ 2) is not supported by the Illinois cases that Plaintiffs cite, the custom of this Court, or the custom of other courts. In *Glasser v. Essaness Theatres Corp.*, 346 Ill. App. 72, 104 N.E.2d 510 (1st Dist. 1952), cited by Plaintiffs, the Appellate Court rejected the plaintiffs' objection to the "participation of the newly appointed justices" in the consideration of a petition for rehearing. *Id.* at 89, 104 N.E.2d at 519. The Appellate Court explained that the "court remains the same notwithstanding a change in the incumbent judges." *Id.* Moreover, "[a]fter familiarizing themselves with the record and briefs in the case, the newly appointed justices were presumably as capable of determining the questions involved" as the original justices. *Id.* at 91, 104 N.E.2d at 520.⁴

⁴ See also *Fried v. Barad*, 175 Ill. App. 3d 382, 391, 530 N.E.2d 93, 99 (1st Dist. 1988) (concluding that judge who was legally constituted successor to justice who participated in earlier decision "ha[d] the right, duty and obligation to participate" in opinion on rehearing). Contrary to Plaintiffs' contention (Pl. Mot. ¶ 2), California law does not "prevent a
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7. Furthermore, from a practical point of view, the contention by Plaintiffs' counsel here is particularly weak because, as Plaintiffs' counsel well knows, the oral arguments in this case were taped and are therefore readily available to Justice Karmeier.

**Plaintiffs' Contentions Regarding
Justice Karmeier's Election Campaign and
Campaign Contributions Do Not
Justify Disqualification**

Plaintiffs' counsel devotes most of the moving papers to attacks on Justice Karmeier, his election campaign, and his contributors. Nothing in Plaintiffs' attacks could possibly justify, much less require, Justice Karmeier's recusal. None of the traditional factors calling for recusal are present in this case. Plaintiffs do not contend that Justice Karmeier during his election campaign or at any other time expressed an opinion on the merits of this case or that he has prejudged this case in any way. Plaintiffs do not contend that Justice Karmeier is hostile to Plaintiffs or to Plaintiffs' counsel. Plaintiffs do not assert that Justice Karmeier has any financial interest or other direct, substantial, or personal interest regarding this case. See, e.g., *Madden v. Cronson*, 114 Ill. 2d 504, 511, 501 N.E.2d 1267, 1271 (1986) (judge's interest in a case requires

justice [of the California Supreme Court], either regular or pro tempore, who had not heard the argument from participating in the pronouncement of a judgment" *Metropolitan Water Dist. v. Adams*, 122 P.2d 257, 262 (Cal. 1942). Notably, Justices of the United States Supreme Court who are absent from oral argument will participate in a decision after listening to the tape of the argument (as Chief Justice Rehnquist has recently done). See Robert L. Stern, et al., *Supreme Court Practice* 715 (8th ed. 2002).

recusal only if it is “‘direct, personal, substantial, [and] pecuniary’”) (quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972)). In fact, far from revealing bias, Justice Karmeier’s statements during his campaign, quoted by Plaintiffs, show him as someone who is “without an agenda” and committed to assuring a “level playing field.” Pl. Mem at 4.

9. Courts in states where (as in Illinois) judges are elected have consistently rejected attempts to disqualify a judge on the basis of legal campaign contributions made by lawyers or litigants who appear before the judge. If parties could succeed in having a judge recused on such a basis, no judge would be immune. Indeed, public records show that Plaintiffs’ Illinois counsel – who are conspicuous by their absence on this motion – have made generous contributions to the campaign committees of many of the Justices of this Court, Justice Maag’s campaign committee, and other judges’ campaign committees throughout this States.⁵

10. In states where judges are elected, campaign contributions are a necessity. A rule disqualifying judges on grounds such as those urged by Plaintiffs here would seriously hamper the administration of justice by causing a wholesale recusal by judges. See Affidavit of Professor Richard W. Painter (“Painter Aff.”) ¶¶ 4, 5, 15.⁶ The Texas

⁵ The Illinois State Board of Elections internet site as well as media reports record the contributions made by Plaintiffs’ counsel. The Affidavit of Theresa M. Powell, submitted herewith, lists examples of those contributions. See Powell Aff. ¶¶ 12-14.

⁶ Professor Painter is the Guy Raymond and Mildred Van Voorhis Jones Professor of Law at the University of Illinois College of Law. He is the co-author of a leading casebook on professional ethics, as well as

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Court of Appeals, rejecting a similar attempt to disqualify appellate judges based upon campaign contributions by a party's attorney, stated:

[I]t is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

Rocha v. Ahmad, 662 S.W.2d 77, 78 (Tex. App. 1983); see also *Lueg v. Lueg*, 976 S.W.2d 308, 311 (Tex. App. 1998) ("Texas courts have repeatedly rejected the notion that a judge's acceptance of campaign contributions creates bias necessitating recusal, or even an appearance of impropriety") (citation omitted); *Apex Towing Co. v. Tolin*, 997 S.W.2d 903, 907 (Tex. App. 1999) (rejecting claim that judge "should have recused himself because he had received substantial political donations from opposing counsel and from one of the parties").

the author of numerous articles. Professor Painter's affidavit is submitted herewith.

11. The Illinois State Bar Association (ISBA) has taken a similar position regarding contributions by attorneys to judicial election campaigns and participation by attorneys in such campaigns.⁷ An ISBA Advisory Opinion on Professional Conduct concludes that "attorneys contributing to, or otherwise participating in, judicial election campaigns are not thereby precluded from appearing in legal proceedings before the judges whose campaigns they have assisted." See ISBA Opinion 866 at 2-3 (April 1984) (Exhibit A)⁸. The ISBA opinion explains the reasons for its determination, stating:

[B]ecause there is no theoretical limit to the number of judicial campaigns in which an attorney may so participate, the judicial system would be unduly encumbered were all attorneys engaging in campaign activities precluded from appearing in litigation before judges in whose campaigns they had participated. Finally, such a restriction would undoubtedly discourage such participation by attorneys, contrary to the apparent policies behind Rule 7-110(a) and EC 7-34; *ie.*, the implicit value of such participation by attorneys, and the need that attorneys not be considered "second class citizens" in connection with political activities.

⁷ Canon 7 of the Illinois Code of Judicial Conduct allows a judge's campaign committee to solicit and accept "reasonable campaign contributions and public support from lawyers." Ill. Code of Judicial Conduct, Canon 7, S. Ct. Rule 67(B)(2). Likewise, the Illinois Attorney Disciplinary Rules permit lawyers to make financial contributions by means of a check, draft, or other instrument payable to a judge's campaign committee. ILCS S. Ct. Rules of Prof'l Conduct, RPC Rule 3.5(h).

⁸ The exhibits cited herein are attached to the Affidavit of Theresa M. Powell ("Powell Aff.") submitted in support of this opposition.

Id. at 2 (citing Committee Commentary to Canon 7). The opinion further states that "[d]isclosure to opposing counsel [of the attorney's campaign activities] also appears unnecessary in view of the conclusion that there is nothing inherently unethical in such conduct, nor anything which would require the consent of the Court or of opposing counsel." *Id.* at 3. Plaintiffs' instant motion for disqualification is improperly based upon the very conduct that ISBA Opinion 866 approves.

12. Of even greater significance, the Illinois Judicial Ethics Committee has similarly concluded that a judge "is not affirmatively obliged to disqualify himself or herself under Rule 63C(1) merely because a lawyer or party appearing before the judge was a campaign contributor." Ill. Jud. Eth. Op. 93-11, 1993 WL 774478, at *2 (Nov. 17, 1993) (Exhibit B). Thus, there is no ethical obligation for Judge Karmeier to recuse himself in this matter.

13. Similarly, the Alabama Supreme Court has considered Canon 7 of the Code of Judicial Conduct (on which Plaintiffs here rely) and concluded that a judge's receipt of campaign contributions from a litigant's attorney or another judge does not warrant recusal or "create a situation in which [the judge's] impartiality might reasonably be questioned." *Roe*, 676 So. 2d at 1233. The Alabama Supreme Court stressed that "[s]uch contributions have uniformly been held not to constitute grounds for recusal." *Id.* (emphasis added).

14. Likewise, in *Nathanson v. Korvick*, 577 So. 2d 943 (Fla. 1991), the Florida Supreme Court found that a judge was not required to disqualify herself in a case in which a litigant's attorney had contributed to her political campaign and served on her campaign committee. The

court emphasized that “[a]s long as the citizens of Florida require judges to face the electorate, either through election or retention, ‘the resultant contributions to those campaigns . . . are necessary components of our judicial system.’” *Id.* at 944 (quoting *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1335-36 (Fla. 1990) (allegation that “a litigant or counsel for a litigant has made a legal campaign contribution to the political campaign of the trial judge . . . is not a legally sufficient ground” for disqualification and does not violate Canon 7)); see also *Raybon v. Burnette*, 135 So. 2d 228, 228-31 (Fla. Dist. Ct. App. 1961) (fact that plaintiff’s counsel ran as a candidate in hotly contested campaign against judge, who was publicly endorsed by and received contributions from defendant’s counsel, did not warrant disqualification of judge).

15. Furthermore, in *In re Disqualification of Ney American Laundry Management, Inc.*, 657 N.E.2d 1367 (Ohio 1995), Chief Justice Moyer of the Ohio Supreme Court construed Canon 7 and held that a judge was not required to recuse himself in a case where a litigant’s attorney had contributed to and solicited contributions for the judge’s election campaign. *Id.* at 1367-68. In addition, the court in *Sheperdson v. Nigro*, 5 F. Supp. 2d 305 (E.D. Pa. 1995), ruled that a judge did not have to recuse himself because he had accepted “significant campaign contributions” from the law firm representing the defendant. *Id.* at 307, 310-11. The court explained, in language equally applicable here:

[T]hat a judge may preside in some cases in which a litigant’s attorney contributed to the judge’s campaign is an almost inevitable concomitant of the policy decision to elect judges. If

a judge must recuse himself whenever a contributing attorney or member of a contributing firm enters an appearance, a candidate who succeeds in attracting contributions from a wide array of lawyers would constantly be recusing himself.

Id. at 311; *see also State v. Carlson*, 833 P.2d 463, 469 (Wash. 1992) (participation of state prosecutor in appellate judge's election campaign did not require recusal or "generate reasonable doubts as to [judge's] impartiality"); *Painter Aff.* 8, 10-12, 14 (discussing Canon 7 and relevant case law).

16. Accordingly, the consistent weight of authority supports the propriety of Justice Karmeier's participation in the resolution of this case. A recusal here would have a chilling effect on attorney contributions to judicial candidates engaged in hotly contested judicial elections. Moreover, the entire Illinois judicial system would be adversely affected, as countless motions for recusal would be made on similar grounds.

**Plaintiffs' Specific Contentions Concerning
Justice Karmeier's Election Campaign and the
Contributions His Campaign Received
Do Not Support Disqualification**

17. Nothing in Plaintiffs' specific contentions about Justice Karmeier's election campaign and the contributions his campaign received would support an exception to the general rule in Illinois and elsewhere that attorneys may properly appear before judges to whose campaigns they have contributed or in whose campaigns they have participated. Plaintiffs' contentions do not establish that there would be any impropriety or even an appearance of impropriety in Justice Karmeier's participating in the

decision in this case. Plaintiffs' motion is based upon implausible inferences and innuendo that are completely unsupported by the facts and Plaintiffs' own exhibits. Plaintiffs have concocted a contention that State Farm somehow engineered contributions to Justice Karmeier's campaign for the purpose of impacting the outcome of this case. This is not only unsupported by any facts, but is contrary to basic common sense. The bulk of the contributions cited by Plaintiffs were made in the summer of 2004.⁹ Oral argument in this case took place in May 2003. This Court's opinion could have been issued at any time during the summer or fall of 2004, and no contributor could have reasonably anticipated that the case would still be pending so as to allow participation by the Justice elected in the November election.

18. Equally lacking is any plausible basis or factual support for Plaintiffs' – contention that State Farm was somehow the moving force behind every contribution made by any civic or business organization to which State Farm has any connection whatsoever. *See* Pl. Mem. at 16-20. Plaintiffs have presented no evidence that this was actually the case, but merely point to such matters as State Farm's membership in organizations that contributed to

⁹ For example, Plaintiffs cite an article from the Associated Press regarding campaign contributions from doctors and trial lawyers "pouring" in for the candidates. *See* Pl. Mem. at 8; Pl. Ex. 11. That article is dated July 10, 2004. Moreover, the article does not state (as Plaintiffs paraphrase it) that "the unprecedented sums of money Karmeier accepted 'could end up eroding the judges' independence to decide cases free of political influence.'" Pl. Mem. at 8 (emphasis added). Rather, the article states that "[c]ritics say both sides [business and medical groups on one hand and trial lawyers on the other] are trying to buy clout by bankrolling the campaigns and could end up eroding the judges' independence." Pl. Ex. 11 (emphasis added).

Justice Karmeier's campaign or to the membership of State Farm employees in such organizations. *See id.* These organizations have numerous members, and Plaintiffs present no evidence whatsoever to back up their baseless assertions that these civic and business organizations are "front groups" for State Farm (*id.* at 17) or that the contributions were meant to influence Justice Karmeier in this case or would be perceived by anybody as influencing him. Plaintiffs' counsel of course does not make (and could not make) any assertion that such contributions would in actuality have any impact on Justice Karmeier's ability to participate fairly and without bias in this case.

19. s an example of Plaintiffs' counsel's tactics, Plaintiffs attempt to draw together into some sort of improper relationship State Farm, the American Tort Reform Association and the Illinois Civil Justice League because "State Farm is a member of The American Tort Reform (ATRA) and Ed Murnane of ICJL has sat on the ATRA Board of Directors since 1997." Pl. Mem. at 20. These facts, contrary to Plaintiffs' contentions (*see id.*), do not evidence a "tight" relationship. The members of ATRA, founded in 1986, include more than 300 businesses, corporations, municipalities, associations, and professional firms across the country. Its Board of Directors has 29 members. *See Exhibit C; Powell Aff.* ¶ 5. Clearly, ATRA is not a "front group" for State Farm, and Plaintiffs' assertion that campaign contributions from organizations like ATRA were part of an "attempt [by State Farm] to cloak their influence over Lloyd Karmeier's election" that "has

left an unsightly, ignoble and loathsome trail" (Pl. Mem. at 17) is incorrect and meritless.¹⁰

20. Plaintiffs also improperly attempt to taint contributions made to Justice Karmeier by organizations that submitted *amicus* briefs in this case and the attorneys who represented them. See Pl. Mem. at 11-12. Those organizations that wished to present their views to this Court on the legal and policy issues in this case have done so through properly submitted *amicus* briefs. The fact that certain organizations that contributed to Justice Karmeier had earlier filed such briefs does not (contrary to Plaintiffs' innuendo) somehow taint their contributions to Justice Karmeier or render Justice Karmeier's participation in this case inappropriate. Indeed, as is well known to this Court, State Farm's amid in this case regularly submit

¹⁰ Plaintiffs also attempt to draw inferences of impropriety from the longtime participation in the Illinois Business Roundtable (IBRT) of State Farm Chairman of the Board and CEO Edward Rust, and the IBRT's creation of the Illinois Civil Justice League (ICJL). See Pl. Mem. at 13, 17. The IBRT created the ICJL in 1993, long before the campaign in this case. Pl. Ex. 44. The IBRT has approximately 63 members from various companies around the state. See Exhibit D; Powell Aff. ¶ 6. The ICJL's members and supporters include many of the major business and professional associations in Illinois, as well as many of Illinois' largest companies, such as Caterpillar Inc., Motorola, CNA Insurance, Deere & Co., Brunswick, Allstate, and Kraft General Foods. See Ex. G; Powell Aff. ¶ 9. Plaintiffs claim that "as chairman-emeritus of IBRT, Edward Rust plays a large role in determining ICJL's activities such as 'changes in the judiciary - and some judges,' which included the Karmeier/Maag campaign." Pl. Mem. at 17. Plaintiffs provide no factual basis for Mr. Rust's alleged "large role" in the IBRT's support of Justice Karmeier and no legal basis for concluding that there would be anything improper if he did play such a role. Mr. Rust's long-time involvement in many business and civic groups such as the IBRT in Illinois, where State Farm has its principal office, clearly is no basis for disqualifying Justice Karmeier.

amicus briefs to this Court (and to many other courts around the country) on issues of public importance. These groups have no pecuniary interest in the outcome of this case. Plaintiffs' moving papers are bereft of any factual evidence that would support their improper attempt to link contributions to Justice Karmeier's campaign by such groups to State Farm and to this particular case.¹¹

21. Although Plaintiffs attempt to link large sums in contributions by a variety of persons and organizations to Justice Karmeier's campaign to State Farm, their moving papers and supporting documentation in fact reveal that a limited number of State Farm officers and employees made quite modest contributions to Justice Karmeier's campaign. See PL Mem. at 11 n.18 (listing five contributions ranging from \$200 to \$250 made to Justice Karmeier's campaign by State Farm employees). There certainly is no impropriety or appearance of impropriety in any of these contributions.

22. Plaintiffs also contend that Justice Karmeier should be disqualified because his opponent in the judicial election was the author of the opinion for the Appellate Court, Fifth District, that is under review in this case. See Pl. Mot. ¶ 4. Plaintiffs cite no case in which a judge was or should have been disqualified for this reason. The fact that

¹¹ With regard to the *amicus* United States Chamber of Commerce, Plaintiffs claim that it is "significant that James Rutrough, State Farm Executive Vice President and Chief Administrative Officer sits on the Chamber of Commerce's Board of Directors." Pl. Mem. at 12. Mr. Rutrough is one of more than 100 board members from businesses around the country. See Exhibit E; Powell Aff. ¶ 7. Plaintiffs' attempt to attribute some unspecified, but nefarious, significance to his membership on the board is another example of the baseless innuendo engaged in by Plaintiffs in making this motion.

the election was hotly contested does not overcome the presumption under Illinois law that a judge is "impartial even after extreme provocation." *See Jackson*, 205 Ill. 2d at 276, 793 N.E.2d at 19. Justice Karmeier's own candid criticism of the negative campaign ads in the race, quoted by Plaintiffs, demonstrates his personal honesty and integrity. *See Pl. Mem.* at 5. Plaintiffs attribute no statement to Justice Karmeier that would display any personal animosity toward Justice Maag. Indeed, one of the newspaper articles relied upon by Plaintiffs makes clear that it was not the candidates themselves, but some of their "allies," who were responsible for the negative campaign ads. *See Pl. Ex. 9*. Furthermore, although the Appellate Court's opinion in this case was authored by Justice Maag, it was the opinion of a panel of appellate judges, making Plaintiffs' contention that Justice Karmeier would or could be perceived to be influenced by the authorship of the opinion under review all the more unlikely.¹² *Cf. Painter Aff.* ¶ 14.

23. In their supporting memorandum, Plaintiffs quote selectively and out-of-context from newspaper articles that they claim support their motion for non-participation.¹³ For example, Plaintiffs quote an editorial from the *St. Louis Post Dispatch* criticizing the tone of the

¹² *Cf. State v. Carlson*, 833 P.2d 463, 468 (Wash. 1992) (discussing the "vast differences" between the roles of trial judges and appellate judges and the unlikelihood that a reasonable person would perceive an appearance of impropriety based upon allegations of prejudice and bias on the part of an appellate judge, who acts as part of a court and whose decisions are written and almost exclusively involve legal issues).

¹³ Professor Painter in his affidavit notes the inappropriateness of Plaintiffs' reliance on newspaper articles as support for their motion for disqualification. *See Painter Aff.* ¶ 16.

election campaign. See Pl. Mem. at 5 & Pl. Ex. 9. Plaintiffs claim that the editorial "suggests that Justice Karmeier might be tempted to 'do favors for the interests that lavished millions on his campaign.'" See *id.* In fact, although the article urges that Illinois' system of electing judges "should be replaced with a merit-selection system," it specifically rejects the notion that Justice Karmeier would be less than honest and impartial, stating that "[g]iven Judge Karmeier's record in the lower courts, we believe he will proceed with integrity." See Pl. Ex. 9. Plaintiffs' distortion of this article appears to be part of an attempt to prevail in this case by securing Justice Karmeier's disqualification.¹⁴

24. Plaintiffs' remaining contentions are equally meritless. For example, Plaintiffs attribute to Ed Murnane, President of the Illinois Civil Justice League, the statement that "he viewed the *Avery* verdict as unfair and believed that it was frivolous and should be overturned." Pl. Mem. at 18. There would be nothing improper in Mr. Murnane's making such a statement, and Plaintiffs offer no evidence that would in any way support attributing Mr.

¹⁴ Indeed, Plaintiffs' Exhibit 9 explains that the election campaign between Justice Karmeier and his opponent "also involve[d] an effort to bring evenhandedness to the plaintiffs' lawyers' paradise that is the Madison County courts. For decades, plaintiffs' attorneys in Madison County have padded the election coffers of local judges with little push-back from business. . . . Such friendly judges, combined with the county's reputation for generous juries, make it a magnet for lawsuits from all over the country, most naming big businesses as defendants. It has also scared the bejabbers out of medical malpractice insurance companies, contributing to sky-high malpractice rates that have set off an exodus of doctors from the Metro East. That, more than anything else, probably explains why the Republican Karmeier won by a small margin in overwhelmingly Democratic Madison County, as well as across Southern Illinois."

Murnane's opinion to Justice Karmeier. Mr. Murnane, although in support of Justice Karmeier's candidacy, was not Justice Karmeier's campaign manager or campaign finance chairman and was not employed by Justice Karmeier's campaign. *See* Pl. Ex. 3 (Senator Dave Luechtefeld served as chairman of Justice Karmeier's campaign, and Dwight Kay served as his finance chairman). The fact that Plaintiffs dredge up Mr. Murnane's statement regarding *Avery* merely illustrates the complete lack of any real substance to their attempt to disqualify Justice Karmeier.

25. In addition, Justice Kanrmeier's purported knowledge of campaign contributions (Pl. Mem. at 14-15) provides no basis for disqualification or recusal in this case. The Committee Commentary to Supreme Court Rule 67 (Canon 7) expressly states that there is no prohibition against a judicial candidate having knowledge of campaign contributions. *See* Committee Commentary, S. Ct. Rule 67, Comment to Paragraph 7B(2). Moreover, the Illinois Judicial Ethics Committee has stated that

the State Election Code makes such information [about who a judge's campaign contributors are] available to the public regarding contributions in excess of \$150. Such a public record places judges and their campaign contributors under public scrutiny, thus providing some assurance of judicial impartiality. And with such information available to the public, *it would be desirable for judges to know their contributors.*

Ill. Jud. Eth. Op. 93-11, 1993 WL 774478, at *2 (Nov. 17, 1993) (Exhibit B) (emphasis added).¹⁵ Accordingly, contrary

¹⁵ The authorities establishing that there is no impropriety in a judge's campaign manager appearing before him after the campaign is
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to Plaintiffs' contentions, there is no impropriety in a judicial candidate's knowing the identity of contributors.

26. Plaintiffs assert that Justice Karmeier had knowledge of \$5,000 contributions from the Illinois State Medical Society and from an organization called JUST-PAC. Pl. Mem. at 15. Plaintiffs also "respectfully suggest[]" that the a [sic] reasonable person would assume that the extent of the sharing of information with Justice Karmeier about who was donating to his campaign and how much they were donating was not an isolated event." Pl. Mem. at 16. Such unsupported speculation is not a basis for recusal. Moreover, even assuming *arguendo* that in some particular circumstances not present here – for example, where a campaign is still ongoing – a judge's knowledge of the identity of campaign contributors could be relevant to disqualification, Plaintiffs have shown no knowledge on the part of Justice Karmeier of any purported connections between contributions and State Farm that would create a grounds for disqualification in this case. Plaintiffs have also cited no case requiring the disqualification of a judge on the basis of his knowledge of the identity of contributors to his campaign.

27. In short, Canon 7 does not prohibit the knowledge of campaign contributions. What Canon 7 does prohibit is the personal solicitation or acceptance of campaign contributions by a judicial candidate. See S. Ct. Rule 67(B)(2) (Canon 7) ("A candidate shall not personally solicit or accept campaign contributions."). Plaintiffs expressly concede that

ended (see ¶ 11 *supra*) also show the incorrectness of Plaintiffs' assertions concerning knowledge. Judges of course know who their campaign managers were and that knowledge clearly creates no ethical difficulties. See *id.*

they "do not allege that Justice Karmeier accepted donations personally rather than through his campaign committee." Pl. Mem. at 15.

**The Cases Cited by Plaintiffs
Do Not Support Disqualification of
Justice Karmeier in this Case**

28. In *Gluth Brothers Construction, Inc. v. Union National Bank*, 192 Ill. App. 3d 649, 548 N.E.2d 1364 (2d Dist. 1989), on which Plaintiffs rely (Pl. Mem. at 18), the Appellate Court held that there was no appearance of impropriety when a judge presided over a case in which the plaintiffs' attorney had served previously as the judge's campaign manager. The court stated that "[t]here was no allegation, or any evidence to support such an allegation, that plaintiffs' attorney had a present, ongoing relationship with the judge as his campaign manager or in any other capacity." *Id.* at 655, 548 N.E.2d at 1368; *see also* *People v. McLain*, 226 Ill. App. 3d 892, 903-05, 589 N.E.2d 1116, 1124-25 (2d Dist. 1992) (recusal of trial judge was not warranted by the fact that State's Attorney had previously chaired judge's election campaign); *Wegman v. Pratt*, 219 Ill. App. 3d 883, 885, 897, 579 N.E.2d 1035, 1037, 1044 (5th Dist. 1991) (affirming denial of plaintiff's motion for change of judge where plaintiff complained that a fair trial was impossible from any judge in Madison County because the trial judge and other judges in that county had received "substantial contributions" from defense counsel's firm); *Painter Aff.* ¶¶ 8, 10 (discussing *Gluth* and *McLain*).

29. In their instant motion, Plaintiffs do not and cannot contend that any counsel for State Farm has a "present, ongoing relationship" with Justice Karmeier's campaign, which ended on Election Day, November 2,

2004. Plaintiffs merely allege that Justice Karmeier had a close relationship with Ed Murnane, who purportedly had some unspecified "close relationship with Ed Rust, Chairman and C.E.O. of State Farm." Pl. Mem. at 19. Plaintiffs make no claim that Mr. Rust had a close relationship with Justice Karmeier or was directly involved in his campaign. Rather, Plaintiffs simply allege that Mr. Rust was active in the Illinois Civil Justice League, which supported Justice Karmeier. *Id.* Such indirect connections with respect to a campaign that has already ended are not a basis for disqualification, and Plaintiffs have cited no case that would support making them one. *Cf. In re Marriage of Click*, 169 Ill. App. 3d 48, 52-53, 523 N.E.2d 169, 172-73 (2d Dist. 1988) (recusal was not warranted where opposing party's counsel and trial judge were both members of "exclusive" organization).

30. Plaintiffs' citation to *Caleffe v. Vitale*, 488 So. 2d 627 (Fla. Dist. Ct. App. 1986), and *Pierce v. Pierce*, 39 P.2d 791 (Okla. 2001), is entirely misplaced. *Caleffe* required a judge's recusal where a party's attorney was "actually running the judge's ongoing reelection campaign." *Caleffe*, 488 So. 2d. at 629 (emphasis added). *Pierce* similarly ordered a judge's disqualification where a litigant's attorney was making maximum contributions to and soliciting funds for the judge's election campaign during the same time that the attorney was appearing in proceedings before the judge. *Pierce*, 39 P.2d at 798. *Caleffe* and *Pierce* do not support disqualification where, as here, the judge's campaign is not ongoing. Moreover, although this case was pending in this Court before Justice Karmeier took office, it was *not* pending before Justice Karmeier at any time during his campaign. Justice Karmeier's participation in

this case could have begun only *after* his election to this Court and his taking office. *See Painter Aff.* ¶ 10.

31. Plaintiffs' reliance on *People v. Bradshaw*, 171 Ill. App. 3d 971, 525 N.E. 2d 1098 (1st Dist. 1988), is inappropriate because that case involved an appearance of impropriety created by a private *ex parte* meeting between a crime victim's mother and the judge, which was not disclosed to the parties. *Id.* at 976, 525 N.E. 2d at 1101. No such circumstances are presented in this case.

32. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), cited by Plaintiffs, is also inapposite. *Liljeberg* involved the failure of a judge, who was a trustee of a university, to disqualify himself from proceedings in which the university had a direct and substantial interest. No such issue is raised here. *See Painter Aff.* ¶ 17.

33. In sum, Plaintiffs have cited no case that supports disqualification under the circumstances of this case. The cases cited above by State Farm, however, are relevant and require that Judge Karmeier has the "right, duty and obligation to participate" in deciding cases pending before this Court, including *Avery*. *See Fried*, 175 Ill. App. 3d at 391, 530 N.E. 2d at 99. *See also Painter Aff.* ¶¶ 2,4-5, 15. Justice Karmeier's impartiality has not been questioned by Plaintiffs' counsel, and there is no appearance of partiality that has been shown or exists.

Wherefore, State Farm respectfully submits that this Court should deny Plaintiffs' motion in its entirety.

Dated: January 31, 2005

Respectfully submitted,

/s/ Wayne W. Whalen
by Theresa Powell
One of the attorneys for
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No. 91494

**In the
Supreme Court of Illinois**

MICHAEL E. AVERY, et al.,)	On appeal from the
on behalf of themselves	)	Appellate Court of
and all others similarly	)	Illinois, Fifth District
situated,	)	No. 5-99-0830 , there
<i>Class Plaintiffs-Appellees,</i>	)	heard on Appeal from
	)	the Circuit Court,
STATE FARM MUTUAL	)	First Judicial Circuit,
AUTOMOBILE	)	Williamson County,
INSURANCE COMPANY,	)	Illinois, No. 97-L-114
)	
<i>Defendant-Appellant.</i>	)	Hon - John Speroni,
	)	Judge Presiding

**MEMORANDUM IN SUPPORT OF APPELLEES'
CONDITIONAL MOTION FOR
NON-PARTICIPATION**

Plaintiff-Appelles [sic], by certain of their attorneys, Lieff, Cabraser, Heimann & Bernstein, LLP, respectfully submit the following Memorandum in support of their Conditional Motion for Non-Participation of Justice Lloyd Karmeier in the decision of this case.

Introduction

The facts of this case are too well known to your Honors to require a lengthy introduction. The case at bards the largest class action judgment in the history of Illinois, and has received national attention for that reason. Also receiving public attention is the judicial race

which brought Justice Karmeier to his position on this Court, a political contest which brought much public criticism, including from the organized bar, and disturbed many citizens of this State. Justice Karmeier was opposed in that judicial race by Gordon Maag, who is the author of this appellate opinion in this case which the Court is now reviewing. The Court is aware of all these facts. It will know also that, in his opinion partially affirming the trial court's judgment, Justice Maag was critical of State Farm's attorneys, particularly with respect to their having argued on appeal matters which were never developed in the record below. Whether those criticisms were justified is very much an issue in these proceedings. The Court is doubtless aware of that.

The Court is also surely aware of the procedural history of this case before it; that leave to appeal was granted, that the case was briefed and argued in May, 2003, and has pended before your Honors since that time. Justice Karmeier of course, did not participate in any of those proceedings, having only newly assumed his duties. The Court is aware of all of this. But what the Court is doubtless not aware of is the fact that, in addition to having waged one of the costliest and bitterest judicial campaigns in Illinois history to secure a seat on this Court and therefore be in a position to review his opponent's decision, Justice Karmeier's campaign was financially supported by attorneys and law firms representing the Defendants in this matter, a trial witness of the Defendant in this matter, employees of the Defendant in this matter, Amicus counsel for the Defendant in this matter, and other lobbyists for the Defendant in this matter.

In the following Memorandum, Plaintiffs will discuss what they have learned so far with respect to this matter,

and why it is their belief that Justice Karmeier should not participate in the decision of this case.

ARGUMENT

A. Justice Karmeier's Impartiality May Reasonably Be Questioned If He Is Not Disqualified Or Does Not Recuse Himself From Participating In The Avery Decision.

Justice Karmeier should be disqualified or recuse himself in *Avery* because his impartiality might reasonably be questioned. The circumstances under which a Judge *shall* disqualify himself or herself from a particular proceeding are set forth in Canon 3 of the Illinois Code of Judicial Conduct, as codified by Illinois Supreme Court Rule 63. Section C reads, in relevant part: "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality *might reasonably be questioned*, including but not limited to instances where: (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer . . . " ILCS Code of Jud. Conduct, Canon, S. Ct. Rule 63(C)(1)(a) (emphasis added). Additionally, disqualification is not limited to circumstances where there is actual bias or prejudice but may also be warranted where there is an appearance of bias or prejudice. *People v. Bradshaw*, 171 Ill.App. 3d 971, 975-76 (1st Dist. 1988) ("a trial judge further has an obligation of assuring the public that justice is administered fairly, because the appearance of bias or prejudice can be as damaging to public confidence as would be the actual presence of bias or prejudice. Therefore, there must be a concerned interest in ascertaining whether public impression will be favorable and the rights of an accused protected even through the judge is convinced of his own impartiality.")

Justice Karmeier and Gordon E. Maag, author of the *Avery* decision, were recently opponents in the “hottest”¹ “most expensive”², “most bitter,”³ “raucous”⁴ judicial campaign in United States’ history. It was highly publicized due to the severity of negative campaigning and negative advertisements by both parties.⁵

Among other things, Justice Karmeier criticized Gordon Maag by claiming that he had an “agenda” while running for the Illinois Supreme Court. Justice Karmeier was quoted by the *St. Louis Post Dispatch* as saying, “I hope that people realize how important this is * * * in the 5th District, to elect somebody to make sure there is a level playing field and *who has no agenda*.”⁶

Justice Karmeier’s spokesperson, Steve Tomaszewski, “hinted that Maag’s criticism of pro-business interests shows he is the candidate of the plaintiffs’ attorneys.”⁷ Justice Karmeier also directly criticized Gordon Maag. For

¹ Mike Lawrence, *The Madness of Electing Judges in Illinois*, *St. Louis Post Dispatch*, August 26, 2004. (Ex. 2).

² 2004: *Illinois Supreme Court race because County’s expensive judicial race*. *The Southern Illinoisan* – 12/26/04. (Ex. 3).

³ *Id.*

⁴ *Race for High Court Hits low Mark* *St. Louis Post Dispatch* – 5/26/04 (Ex. 4). See also *The Battle Of the Courts, How Politics, Ideology and Special Interests are Compromising the U.S. Justice System*, *Business Week Magazine* – 9/27/04, (Ex. 5).

⁵ *Illinois Supreme Court Race Became the Country’s Most Expensive Judicial Race*, *The Southern Illinoisan*, December 26, 2004. (Ex. 3).

⁶ Trisha L. Howard, *Chamber Backs Judicial Candidate*, *St. Louis Post-Dispatch*, June 9, 2004 (Ex. 6). (emphasis added).

⁷ Kevin McDermott, *Two High Court Candidates Fight Over Fund Raising; Maag Of Glen Carbon Sets Voluntary \$2,000 Limit Per Campaign Contributor*, *St. Louis Post-Dispatch*, January 9, 2004. (Ex. 7).

example, on October 27, 2004, the *St. Louis Post Dispatch* ran a story that discussed the “millions of dollars in television attack ads” in the Illinois Supreme Court race where “ominous narrators imply that the candidates allow torturers to go free, or that they coddled child murderers, or released sexual predators.” When an audience member asked Justice Karmeier about the negative ads he “blushed” and stated that “[w]e both have negative ads. But let me tell you something – and this is the absolute truth: My aides came to me and said that if I didn’t bring up things critical of my opponent, voters will say, ‘I heard something negative about Karmeier, but I didn’t hear anything bad about the other guy.’” When the audience member told Justice Karmeier that she thought that it was obscene, he stated, “It is obscene.”⁸ In the same article, Justice Karmeier was described as “aggressive” in a radio interview in Greenville where he stated that the “Supreme Court needs a little balance. You bring a conservative approach to the bench if you come from a rural area. We don’t have the class action suits and other problems they have in St. Clair and Madison counties.”⁹

On November 5, 2004, *The St. Louis Post Dispatch* (which endorsed Justice Karmeier for the Illinois Supreme Court) ran an editorial stating that “Big business won a nice return on a \$4.3 million investment in Tuesday’s election. It now has a friendly justice on the Illinois Supreme Court. * * * And anyone who believes in even-handed justice should be appalled at the spectacle of a big-money effort to buy a Supreme Court seat.” The editorial

⁸ *St. Louis Post Dispatch* – 10/27/04 – “Despite tone of TV ads, candidates are folksy on the stump.” (Ex. 8).

⁹ *Id.* (emphasis added).

described the election as an “ugly, dispiriting, destructive, misleading, money-drenched race.” It goes on to say that the “voters of Southern Illinois were sold a Supreme Court justice with methods worse than those used to sell them laundry detergent.” It also stated that both Maag and Justice Karmeier knew that their ads were distortions of the truth, and after watching weeks of such shameful accusations, the average voter “is bound to have lost respect for both men, as well as the Supreme Court itself.” The article suggests that Justice Karmeier might be tempted to “do favors for the interests that lavished millions on his campaign” and that the average citizen must be “wondering if it’s payback time.”¹⁰

If Justice Karmeier is not disqualified or does not recuse himself from this case, he will be reviewing an opinion written by his opponent in the election, Justice Gordon Maag. The campaign for election to the Supreme Court was described by the press as a “nasty race.”¹¹ Indeed, the Illinois State Bar Association reprimanded both candidates for airing misleading attack ads during the campaign.¹² As an editorial in the Chicago Tribune opined, “[t]he Maag-Karmeier race was a vicious, mud-slinging affair that became the most expensive judicial race in Illinois history. Both Maag and Karmeier were targets of fierce negative ad campaigns financed by \$8.5 million raised by the candidates’ supporters. The ads were so nasty the Illinois State Bar Association implored both

¹⁰ *St. Louis Post Dispatch* – 11/5/04 – “Buying Justice.” (Ex. 9).

¹¹ Mike Robinson, *Doctors, Trial Lawyers Pour Cash Into Nasty Supreme Court Race*, Associated Press, July 10 2004. (Ex. 10).

¹² Georgina Gustin, *Bar Association Asks Judicial Candidates To Pull Attack Ads*, *St. Louis Post-Dispatch*, Oct. 22, 2004. (Ex. 11).

sides to withdraw them. Neither did.”¹³ This fact alone, that justice Karmeier would be reviewing an opinion written by his opponent in an election described as “vicious” and “nasty,” is enough for a person to reasonably question Justice Karmeier’s ability to remain impartial.

That a judge must disqualify himself or herself when that judge’s impartiality might reasonably be questioned is a consequence of the first two Canons of the Illinois Code of Judicial Conduct. Canon I of the Illinois Code of Judicial Conduct, as codified by Illinois Supreme Court Rule 61, is entitled “A Judge Should Uphold the Integrity and Independence of the Judiciary.” It states in full: “An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.” ILCS Code of Jud. Conduct, Canon, S. Ct. Rule 61. Petitioner respectfully argues that should Justice Karmeier participate in the *Avery* decision, the apparent integrity and independence of the Illinois Supreme Court would be seriously eroded and the public’s confidence will be damaged.

Canon 2 of the Illinois Code of Judicial Conduct, as codified by Illinois Supreme Court Rule 62, is entitled “A Judge Should Avoid Impropriety and the Appearance of Impropriety in All of the Judge’s Activities.” It states, in relevant part: “A judge should respect and comply with the

¹³ Editorial, *Gordon Maag’s Revenge*, Chicago Tribune, December 24, 2004. (Ex. 12).

law and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." ILCS Code of Jud. Conduct, Canon, S. Ct. Rule 62(A). Thus, a judge is ethically required to consider not just whether he is actually biased or partial with respect to a party or a party's attorney, but *whether there is the mere appearance of impropriety*. The canons of legal ethics require the avoidance of any public perception of judicial impropriety, whether or not any impropriety actually exists. *People v. Bradshaw*, 171 Ill.App. 3d at 976. Indeed, the obligation remains steadfast even though the judge is unequivocally sure that he is not partial to either litigant in a case pending before the court. *Id.* Additionally, a judge has an obligation of assuring the public that justice is administered fairly, because the appearance of bias or prejudice can be as damaging to public confidence as would be the actual presence of bias or prejudice. *People v. Bradshaw*, 171 Ill. App. 3d at 975-76. Petitioner respectfully argues that public perception, as evinced by mainstream media coverage of Justice Karmeier's campaign, indicates the appearance of impropriety, should Justice Karmeier be allowed to participate in the *Avery* appeal.

Mike Robinson of the Associated Press wrote of the campaign that the unprecedented sums of money Karmeier accepted "could end up eroding the judges' independence to decide cases free of political influence."¹⁴ Still other articles in the press reveal that Ed Murnane, president of the Illinois Civil Justice League "frequently advise[d] the

¹⁴ Mike Robinson, *Doctors, Trial Lawyers Pour Cash Into Nasty Supreme Court Race*, Associated Press, July 10 2004. (Ex. 10).

campaign,”¹⁵ and that Judge Karmeier and Ed Murnane often strategized about fundraising activities, even to the point where Justice Karmeier “told aides some lawyers wanted to contribute to his campaign but didn’t like their names on a list ‘that anyone could obtain.’”¹⁶ As discussed below, the Illinois Civil Justice League’s political action committee, JUSTPAC provided, over a million dollars to Justice Karmeier’s campaign. State Farm is a leading contribution to the Illinois Civil Justice League. The Associated Press article also revealed that Justice Karmeier himself strategized about fundraising, going so far as to suggest in an email to Murnane stating: “we keep our [donation] levels more modest, like that \$125 that stays under the \$150 rate for reporting the individual names of contributors’ to the state Board of Elections.”¹⁷ As the committee notes to Canon 2 state, “A judge must avoid all impropriety and appearance of impropriety.” ILCS Code of Jud. Conduct, Canon, S. Ct. Rule 62. Petitioners respectfully submit that Justice Karmeier can not and will not avoid the appearance of impropriety if he fails to recuse himself or be disqualified from this matter.

The Supreme Court of the United States has announced the standard by which a judge’s impartiality might reasonably be questioned. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860-61 (1988) the Court held that “recusal is required even when a judge lacks

¹⁵ Brian Brueggemann, *Emails Can Give Insight Into Karmeier Campaign*, Belleville News Democrat, May 31 2004. (Ex. 13).

¹⁶ Mike Robinson, *Doctors, Trial Lawyers Pour Cash Into Nasty Supreme Court Race*, Associated Press, July 10 2004. (Ex. 10).

¹⁷ Mike Robinson, *Doctors, Trial Lawyers Pour Cash Into Nasty Supreme Court Race*, Associated Press, July 10 2004. (Ex. 10).

actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge." (quoting *Health Services Acquisition Corp. v. Liljeberg*, 796 F.2d 796, 802 (5th Cir. 1986)). The issue here thus is not whether Justice Karmeier is actually biased in favor of State Farm and/or against Judge Maag's ruling against State Farm, rather the issue is whether to a reasonable person, knowing all the circumstances, Justice Karmeier's impartiality might be reasonably questioned by his participation in the decision of this case. Petitioner submits that the circumstances here require Justice Karmeier to not take part in hearing this case.

B. Hundreds of Thousands Of Dollars In Campaign Contributions From State Farm, a State Farm Witness, State Farm Employees, State Farm Attorneys, State Farm Amici And Other Lobbyists Further Raise The Appearance Of Impropriety And Reflect Inappropriate Political Activity

Canon 7 of the Illinois Code of Judicial Ethics, codified by Supreme Court Rule 67, controls the propriety of judicial political activity, including fundraising. Entitled, "A Judge or Judicial Candidate Shall Refrain From Inappropriate Political Activity," the Canon states in relevant part:

A candidate shall not personally solicit or accept campaign contributions. A candidate may establish committees of responsible persons to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and

other means not prohibited by law. Such committees may solicit and accept reasonable campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting reasonable campaign contributions and public support from lawyers. A candidate's committees may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than 90 days after the last election in which the candidate participates during the election year. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

ILCS Code of Jud. Conduct, Canon, S. Ct. Rule 67(B)(2). To promote the independence of the judiciary and to reduce the potential appearance of any impropriety, the Code of Judicial Conduct restricts personal solicitation or acceptance of campaign contributions by judges, and requires that only a campaign committee be involved in campaign fundraising. Further, the rule states that such committees may only accept reasonable campaign contributions, and may do so only within a limited time period surrounding an election, to further prevent public perception of corruption or improper influence over the judiciary.

The Committee Commentary to Canon 7 states "Paragraph 7B(2) permits a candidate to solicit publicly stated support, and to establish campaign committees to solicit and accept public support and reasonable financial contributions. At the start of the campaign, the candidate must instruct his or her campaign committees to solicit or accept only contributions that are reasonable under the

circumstances. *Though not prohibited campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under subsection C of Canon 3.*" (emphasis added) ILCS Code of Jud. Conduct, Canon, S. Ct. Rule 67. Indeed at least one Court has recognized that a judge's impartiality might reasonably be questioned and that recusal was required where campaign contributions were made by an attorney and others associated with an attorney and where the attorney further assisted the judge's campaign by soliciting funds on behalf of the judge during a pending case in which the lawyer was appearing before that judge. *See, e.g. Pierce v. Pierce*, 39 P.2d 791 (Oklahoma 2001).

The Committee Commentary illuminates two guiding principles: first, that the campaign committee, not the judge, is only supposed to be involved in campaign fundraising, and that the judge is supposed to make sure at the start of the campaign that the committee knows only to accept campaign donations "that are reasonable under the circumstances." This raises the question of whether it is reasonable for him to sit on this matter when Justice Karmeier's campaign accepted hundreds of thousands of dollars in donations – when the Supreme Court had already granted leave to appeal, had heard oral argument, and while the Court's decision in *Avery* was still pending – from a State Farm witness, lawyers and lawfirms representing State Farm in the *Avery* litigation and appeals, State Farm employees, State Farm Amici and other State Farm lobbyists.

Indeed, Justice Karmeier's campaign accepted direct donations totaling over \$350,000 from sources intimately involved with or interested in the *Avery* litigation, including:

at least four State Farm executives, former executives or in-house counsel;¹⁸ Mayer, Brown, Rowe & Maw, the law firm representing State Farm in the Fifth District Appeal of *Avery* before Justice Maag,¹⁹ the lead trial attorney representing State Farm in the *Avery* trial, Marci Eisenstein of Schiff, Hardin & Waite, and Heyl, Royster, Voelker and Allen, the law firm of another State Farm trial attorney – Robert H. Shultz;²⁰ Amici and law firms representing Amici for State Farm in the *Avery* appeal, including Sonnenschein Nath & Rosenthal, Allstate Insurance [sic], American Council of Life Insurers, Ford Motor Company, General Motors PAC, The Illinois Chamber of Commerce, The Illinois Manufacturer's Association (Manufacturer's PAC), and Winston & Strawn.²¹

¹⁸ Michael Davidson, Senior Vice President – Agency, State Farm \$200 – 8/31/04 (Ex. 14); Stanley Ommen, President and Chief Executive Officer, State Farm Bank \$250 – 8/31/04 (Ex. 15); Kim Brunner, Executive Vice President and General Counsel, State Farm \$250 – 4/30/04 (Ex. 16); Roger Joslin, Retired Chairman of the Board, State Farm \$200 – 8/31/04 (Ex. 17); and State Farm attorney Stephen McManus – \$250 – 7/29/04 (Ex. 18).

¹⁹ Mayer, Brown, Row & Maw, contribution 5,000 10/7/04. See (Ex. 19).

²⁰ Einsenstein, Marci (of Schiff, Hardin & Waite) \$500 – 5/26/04 (Ex. 20); Heyl, Royster, Voelker & Allen \$1,950 – 7/10/04 (Ex. 21).

²¹ Sonnenschein Nath & Rosenthal, \$2,500 – 6/5/04, \$5,000 – 10/7/04 (Ex. 22); Allstate Insurance Company \$5,000 – 10/7/04 (Ex. 23); American Council of Life Insurers \$22,500 – 10/7/04 (Ex. 24); Ford Motor Company \$5,000 – 10/15/04 (Ex. 25); General Motors PAC \$500 – 5/4/04, \$1,000 – 10/27/04 (Ex. 26), Illinois Chamber of Commerce – Total: \$284,338.32 (Ex. 27); Manufacturer's PAC (Illinois Manufacturer's Association) \$30,000 – 10/25/04, \$5,000 – 9/1/04 (Ex. 28); Winston & Strawn \$10,000 – 10/7/04 (Ex. 29).

The United States Chamber of Commerce, which filed an amicus brief in support of State Farm in *Avery*, contributed well over \$1 million to the Karmeier Campaign through donations to the Illinois Republican Party which, in turn passed on in-kind contributions for advertising and other needs on to Karmeier's Campaign.²² It is significant that James Rutrough, State Farm Executive Vice President and Chief Administrative Officer sits on the Chamber of Commerce's Board of Directors.²³

JUSTPAC, the Illinois Civil Justice League ("ICJL") Political Action Committee donated \$926,000 to Justice Karmeier. It should be noted that 91.5% of JUSTPAC's transfers, in-kind contributions, expenses, and donations during the 2004 election cycle went to the Karmeier campaign. As discussed further below, Edward B. Rust – State Farm's chairman and Chief Executive officer and witness at the *Avery* trial – as a leader in the Illinois Business Roundtable (IBRT) was instrumental in creating JUSTPAC. Moreover, as discussed further herein, JUSTPAC is headed by Ed Murnane, who directly communicated with Justice Karmeier about his campaign, revealing information about donors and amounts to the Karmeier campaign. In fact, Ed Murnane was so involved with Justice Karmeier's campaign that he offered Douglas B. Wojcieszak the job of campaign manager of Karmeier's campaign.²⁴

²² US Chamber of Commerce donations to the Republican Party: \$950,000 – 10/20/04 & \$350,000 – 10/22/04, for a total of \$1.3 million. (Ex. 30). In-kind contributions from The JUSTPAC totaled over \$1.1 million. (Ex. 31).

²³ (U.S. Chamber of Commerce Board of Directors List, Ex. 32).

²⁴ Affidavit of Douglas B. Wojcieszak (Ex. 1).

Among the contributors to JUSTPAC were the United States Chamber of Commerce, with another \$200,000;²⁵ State Farm executives Edward B. Rust, James Rutrough (Senior Executive Vice President and Chief Administrative Office of State Farm), William King (Executive Vice President of State Farm), Susan Waring (Senior Vice President and Chief Administrative Officer of State Farm life), Kim Brunner (State Farm Executive Vice President and General Counsel), David Hill (State Farm Vice President and Counsel);²⁶ The American Insurance Association,²⁷ an Amicus for State Farm in *Avery*; and Proactive Strategies,²⁸ a State Farm lobbying organization.

Given Murnane's involvement with the Karmeier campaign, it is no stretch to say that a reasonable person could question these contributions from State Farm and its representatives to JPAC, while the *Avery* decision was pending before this Court.

The second guiding principle that the Committee Commentary illuminates is that a judge's knowledge of donations made to his campaign by lawyers or parties appearing before him is grounds for disqualification pursuant to subsection C of Canon 3, Illinois Supreme

²⁵ The US Chamber donation to JUSTPAC - \$200,000 - 10/1/04 (Ex. 33), JUSTPAC made in-kind contributions to Karmeier followed a few days later - \$35,000 - 10/5/04, \$186,125 - 10/13/04 (Ex. 34).

²⁶ Edward Rust, Jr. - \$1,000 - 4/1/04 (Ex. 35); James E. Rutrough - \$250 - 7/27/04 (Ex.36); William King - \$500 - 9/3/04 (Ex. 37); Susan Waring, Senior - \$500 - 7/27/04 (Ex. 38); Kim Brunner - \$1,000 - 7/27/04, \$500 - 7/27/04 (Ex. 39); David Hill - \$300 - 1/26/04, \$250 - 4/30/04, \$500 - 9/8/04 (Ex. 40).

²⁷ American Insurance Association - \$50,000 - 10/25/04 (Ex. 41)

²⁸ Proactive Strategies, \$5,000 - 7/29/04 donation made to JUSTPAC (Ex. 42).

Court Rule 63. As it was revealed during the campaign, Justice Karmeier was involved in fundraising discussions with his campaign committee. As the Associated Press reported, emails were revealed in which Justice Karmeier had discussions with his aides about certain lawyers who wanted to contribute to his campaign, but were wary of being seen on a list of campaign donors "that anyone could obtain," where Justice Karmeier went so far as to suggest donations below a certain amount to avoid the necessity of reporting the individual names of the contributors.²⁹

This same article revealed that not only was Justice Karmeier involved in the campaign finance strategy of his candidacy, he was told specific names of contributors and the amounts they donated by his campaign. The Associated Press article revealed that lobbyist Ed Murnane, President of the Illinois Civil Justice League and its political action committee, JUSTPAC, both of which received money from State Farm, revealed not just names of campaign contributors to Justice Karmeier, but the amounts they gave. "With or without limits, you're still going to get hit with the charge that your support is coming from fat cats," Murnane wrote. He said the fat cats 'include (close your eyes, Judge) the Illinois State Medical Society and JUSTPAC, \$5,000 each.'³⁰ It seems Mr. Murnane found it appropriate to tacitly recognize the fact that he and Justice Karmeier might be violating the Illinois Code of Judicial Ethics, and some might even argue he found it appropriate to mock the spirit, if not the

²⁹ Mike Robinson, *Doctors, Trial Lawyers Pour Cash Into Nasty Supreme Court Race*, Associated Press, July 10 2004. (Ex. 10)

³⁰ Mike Robinson, *Doctors, Trial Lawyers Pour Cash Into Nasty Supreme Court Race*, Associated Press, July 10 2004. (Ex 10)

letter of those canons of ethics regarding campaign finance.

The very purpose of Canon 7's requirement that a judge utilize a campaign committee is to balance the need to finance a campaign with a judge's ethical duty to remain impartial and independent in the eyes of the public. As this Court has observed, "[t]he rule's requirement that attorney contributions be made to judicial campaign funds rather than to the candidate personally seeks to eliminate the appearance of improper influence by separating the candidate from campaign contributions." *In re Lane*, 535 N.E.2d 866, 872 (1989). While Petitioner does not allege that Justice Karmeier accepted donations personally rather than through his campaign committee, it has been made public that Justice Karmeier discussed campaign donations – who made them and how much they gave – with Ed Murnane.

Subsection A(3)(b) of Canon 7 of the Illinois Code of Judicial Ethics, Supreme Court Rule 67 requires that a "candidate for a judicial office: . . . shall prohibit employees and officials who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the provisions of this Canon." Yet one could reasonably question whether Justice Karmeier's relationship with Ed Murane fails to satisfy the ethical duties imposed by Canon 7.

Petitioner respectfully suggests that the a reasonable person would assume that the extent of the sharing of information with Justice Karmeier about who was donating to his campaign and how much they were donating

was not an isolated event. As such, and as the committee commentary implies, Justice Karmeier should recuse himself or be disqualified from hearing a case where one of the parties witnesses and many of its legal representatives donated to his campaign.

Further, the fact that the donations were given to a candidate for Justice of the Illinois Supreme Court, who stands to decide legal issues of great importance that affect not just the interests of the parties to this case, but the interests of the public at large, creates a heightened risk of the appearance of bias and partiality.

C. State Farm's Connections to Justice Karmeier's Campaign Raise The Appearance Of impropriety And Raise Questions About Justice Karmeier's Impartiality

State Farm and it's chairman, Edward Rust, have been hard at work to overturn the plaintiffs' verdict in *Avery vs. State Farm*. But, their efforts have taken them beyond the usual courtroom tactics and into the bloody arena of the recent campaign for Illinois Supreme Court between Lloyd Karmeier and Gordon Maag. State Farm worked most closely with the ICJL. Edward Rust helped create ICJL and he and his staff work closely with ICJL in defining it's agenda. State Farm also participated with other front groups such as the Illinois Coalition for Jobs, Prosperity, and Growth, the American Tort Reform Association, and the Illinois Insurance Association. See Affidavit of Douglas B. Wojcieszak, ¶¶3-5, 7 (Ex. 1) ("Wojcieszak Aff."). State Farm's attempt to cloak their influence over Lloyd Karmeier's election from the voters, the media, and the Illinois Supreme Court has left an unsightly, ignoble and loathsome trail.

For several years; Edward Rust, Chairman of the Board and CEO of State Farm, has been a leader in the Illinois Business Roundtable (IBRT) and is currently the chairman emeritus of the group. (*IBRT OfficersList*, Ex. 43). Rust and his IBRT colleagues created the Illinois Civil Justice League, hired and worked with the group's first and current President, Ed Murnane, and continue to work closely with ICJL today. The IBRT website states:

"... the Roundtable created the Illinois Civil Justice League."

"The Roundtable continues to support the ICJL and plays an active role on the ICJL's Board of Directors and Executive Committee. The ICJL in turn works closely with and provides staff and professional support for the Roundtable's Civil Justice Reform Task Force."

"... the ICJL and the IBRT are heavily focused not only on the legislative reforms that can fix a broken legal system, but also on the changes in the judiciary – and some judges – that are necessary to properly enforce and interpret the law."

(*IBRT Web-Site*, Ex. 44)

Indeed, as chairman-emeritus of IBRT, Edward Rust plays a large role in determining ICJL's activities such as "changes in the judiciary – and some judges," which included the Karmeier/Maag campaign. Bill Shepherd, a State Farm attorney and registered lobbyist, also plays an active role in the Illinois Civil Justice League and confers often with Ed Murnane. Shepherd attends many ICJL meetings and conference calls. (*Wojcieszak Aff.* at ¶3).

The ICJL website lists State Farm as a member (*ICJL Web-Site*, Ex. 45), and membership for a company the size

of State Farms costs \$10,000 annually (*ICJL On-Line Membership Form*, Ex. 46).

Murnane's main job functions as ICJL President are public relations on the tort reform issue, lobbying, and managing campaigns for pro-tort reform judges. For example, ICJL, State Farm, IBRT, and others joined together to petition the Illinois Supreme Court to adopt Rule 225. (*Class Action Litigation Report*, October 10, 2003 Ex. 47). Counsel for State Farm just testified in support of adopting Rule 225.³¹ An article from the Illinois Campaign for Political Reform website on the Karmeier/Maag race quoted Murnane on his interest in the race and his thoughts on how *Avery vs. State Farm* would play a role in the race. (*Media Guide Fifth Judicial Circuit Issues Expected to Play a Role in the Election*, Ex. 49). Additionally, Murnane has said that he viewed the *Avery* verdict as unfair and believed that it was frivolous and should be overturned.³² Additional news articles from the *Belleville News Democrat* and *Associated Press* show that Murnane was actively managing Karmeier's campaign (Group Ex. 50).

In *Gluth Bros. Const., Inc. v. Union Nat. Bank*, 548 N.E.2d 1364, (2d Dist. 1989), the court reviewed case law and recognized that an appearance of impropriety exists when a judge has a "present, ongoing relationship with the attorney [for one of the parties] while the case [is] still pending." *Gluth Bros.*, 548 N.E.2d at 1368. Among other cases, the *Gluth* court reviewed *Caleffe v. Vitale*, 488 So.2d 627, (Fla.App.1986). There, one of the attorneys involved

³¹ *Chicago Daily Law Bulletin*, January 25, 2005 (Ex. 48).

³² Wojcieszak Affidavit ¶7. (Ex. 1)

in the case served as cochairman of the judge's pending reelection committee. The court held that this relationship created an appearance of impropriety requiring the judge to disqualify himself from the case at issue. *Caleffe*, 488 So.2d at 629. The court based its decision on the fact that the attorney "is actually running the judge's ongoing reelection campaign." 488 So.2d at 629.

The circumstances here are similar to those in *Caleffe*. Justice Karmeier has a well documented current relationship with Ed Murnane, who has a close relationship with Ed Rust, Chairman and CEO of State Farm, and who himself was involved intimately with the Karmeier campaign through the Illinois Civil Justice League (which filed an amicus brief in *Avery* on support of State Farm). These relationships are ongoing and current and give the appearance of potential bias in favor of State Farm.

Murnane and ICJL not only ran Karmeier's race but also heavily financed his campaign its political action committee, JUSTPAC. JUSTPAC provided at least \$1 million to Citizens for Karmeier, (Ex. 51). JUSTPAC received its money from a variety of sources, including two other State Farm related groups: American Tort Reform Association (\$415,000) and Illinois Coalition for Jobs, Prosperity, and Growth (\$150,000). (Ex. 52)³³

JUSTPAC also received donations from several State Farm executives, including Edward Rust, who testified in the *Avery* Trial (Ex. 53). Over 91% of JUSTPAC's contributions went to Karmeier during the 2004 election, so a contribution to JUSTPAC was a poorly blinded contribution to

³³ The 2005 contribution reports are not yet out to give an even more complete picture.

Karmeier. (Wojcieszak Aff. ¶5, Ex. 1). The chairman of JUSTPAC Todd Maisch, is also the head lobbyist for the Illinois State Chamber of Commerce (Wojcieszak Aff. ¶4 Ex. 1).

In Spring 2004, the IBRT (which Rust serves as chair emeritus), the ICJL (which has a proven close working relationship with State Farm), and the Illinois State Chamber (which has Peggy Echols, a State Farm Vice President on the Board of Directors), joined together to create a new group: Illinois Coalition for Jobs, Growth, and Prosperity. (*Illinois Coalition for Jobs, Growth and Prosperity Web-Site*, Ex. 54).

The group has a PAC – Illinois Coalition for Jobs, Growth and Prosperity PAC – and all the money the PAC raised came from the coalition itself (Ex. 55). However, the coalition does not have to show where it received its money. Consequently contributors can pump all the money they want into the Coalition which can transfer the money to the PAC without it being traced. The Coalition's PAC dispersed its fund to help Karmeier's campaign: (1) \$150,000 donation to JUSTPAC; (2) \$8,000 donation to Citizens for Karmeier; and (3) Four negative mail pieces about Gordon Maag that were mailed to voters in the 5th Judicial District. (Ex. 56).

State Farm is a member of The American Tort Reform (ATRA) and Ed Murnane of ICJL has sat on the ATRA Board of Directors since 1997. (*ICJL Web-Site*, *ATRA Web-Site*, Ex. 57). There is no question that there is a tight relationship between ATRA, State Farm and Ed Murnane/ICJL. Again, since 91.1% of JUSTPAC's donations went to Karmeier, ATRA's donations to JUSTPAC funded

Karmeier's campaign. But, like the Coalition, ATRA doesn't have to reveal where it receives its funding.

The Illinois Insurance Political Committee (IIPC) donated \$6,000 directly to Karmeier (Ex. 58). IIPC receives its money from the Illinois Insurance Association ("IIA"), which has the same address as IIPC (Ex. 59). Just like the Coalition and ATRA, does not have to reveal where it receives money. Furthermore, Bill Shepherd of State Farm sits on the IIA Board of Directors. (*IIA Web-Site*, Ex. 60).

CONCLUSION

As the preamble to the Illinois Code of Judicial Conduct declares, "[o]ur legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. . . . Intrinsic to all provisions of this code are precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system." The totality of events demonstrate an appearance of impropriety. Judge Karmeier's campaign accepted hundreds of thousands of dollars in donations directly and/or indirectly from State Farm, its legal representatives, amici, and employees, while a decision in this case was pending. The public is aware that Justice Karmeier, during the campaign, discussed the identities of contributors to his campaign and the amounts they gave with his campaign committee. If Justice Karmeier is planning on participating in this matter, he would be evaluating a decision of his opponent in the most expensive Judicial campaign in Illinois history – an election that was described at best as "vicious," and

“nasty.” Under the circumstances a reasonable person could question Justice Karmeier’s impartiality and would assume that Justice Karmier [sic] knows of the potential for the appearance of impropriety and bias. For the foregoing reasons, Justice Karmeier should be disqualified or recuse himself from hearing this case pursuant to Illinois Supreme Court Rule 63(C).

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IN THE
Supreme Court of the United States

MICHAEL E. AVERY, *et al.*,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE
INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did due process require Justice Lloyd Karmeier of the Illinois Supreme Court to recuse himself from participating in the decision in this case, given that (i) the decision was issued more than nine months after his election to the Court, (ii) he had no direct, personal, substantial, or pecuniary interest in the outcome of the case, (iii) Respondent made no contributions to his campaign, (iv) a handful of employees of Respondent made modest contributions to his campaign, and (v) virtually all of the contributions that Petitioners seek to attribute to Respondent were in fact made by independent individuals, businesses, and civic organizations?

CORPORATE DISCLOSURE STATEMENT

Respondent State Farm Mutual Automobile Insurance Company is a mutual insurance company. It has no parent company.

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STATEMENT OF CASE

A. The Illinois Supreme Court's Decision on the Merits

Petitioners-Plaintiffs ("Plaintiffs") petition this Court to grant review and overturn the Illinois Supreme Court's reversal of a nationwide class action judgment of more than \$1 billion against Respondent-Defendant State Farm Mutual Automobile Insurance Company ("State Farm"). Plaintiffs' lawsuit asserted contract claims and claims under the Illinois Consumer Fraud Act ("ICFA") challenging State Farm's specification of non-original equipment manufacturer ("non-OEM") parts for the repair of its insureds' automobiles. The Illinois Supreme Court ruled unanimously that the trial court had erred in certifying a nationwide class of approximately 4.75 million State Farm policyholders who had non-OEM parts specified on their State Farm repair estimates. In an opinion authored by Chief Justice Mary Ann McMorrow and joined by three other Justices, a majority of the Illinois Supreme Court held that the varying contractual language in different State Farm insurance policies rendered class certification of Plaintiffs' breach of contract claim erroneous under Illinois law. Pet. App. 31. The majority also held that subclassing would be impermissible, given, *inter alia*, the need for "individual examination of hundreds of thousands, if not millions, of vehicles" to determine if the cars had been restored to their pre-loss condition in accordance with State Farm's contractual obligations. Pet. App. 35. The two remaining justices concurred in holding that certification of a nationwide class was erroneous, concluding that differences in state law rendered a nationwide class unconstitutional. Pet. App. 121-23. The two justices, however, would have remanded for a determination whether there existed any subclass of the nationwide class with respect to which some portion of the verdict might be upheld. Pet. App. 142.

With respect to Plaintiffs' claims under the ICFA, the Illinois Supreme Court unanimously agreed (i) that the Illinois

statute did not apply to transactions outside Illinois and therefore a nationwide class should not have been certified (Pet. App. 94, 144), and (ii) that the only named Plaintiff from Illinois had not shown the necessary elements of actual damages, actual deception and proximate cause. Pet. App. 101-10, 144-45. Accordingly, the entire Court agreed that the judgment against State Farm on Plaintiffs' ICFA claim and the \$600 million punitive damages award entered against State Farm on that claim should be reversed.

B. Plaintiffs' Motion for the Non-Participation of Justice Karmeier

In their Petition for Certiorari, Plaintiffs do not ask for review of the substantive rulings made by the Illinois Supreme Court in its decision reversing the judgment on all of Plaintiffs' claims. Rather, Plaintiffs seek review and reversal of the Illinois Supreme Court's decision based solely on their claim that participation in the decision by Justice Lloyd Karmeier violated Plaintiffs' due process rights. Plaintiffs brought their motion for the non-participation of Justice Karmeier before the Illinois Supreme Court three times -- twice before the Court's decision in this case, and once in a rehearing petition after that decision.

Plaintiffs' original motion for the non-participation of Justice Karmeier was filed on January 26, 2005. Pet. App. 288. In opposing Plaintiffs' motion, State Farm showed that Plaintiffs' factual assertions (many repeated here) contained serious inaccuracies and distortions. *See infra* at 4-11. State Farm also showed that the overwhelming weight of authority, from Illinois and from courts around the country, rejected the contention put forth by Plaintiffs here that contributions alone to a judge's campaign committee from lawyers or litigants create bias or the appearance of impropriety.¹ Pet. App.

¹ Canon 7 of the Illinois Code of Judicial Conduct expressly allows a judge's campaign committee to solicit and accept "reasonable campaign

270-75. State Farm submitted with its opposition the affidavit of an expert on legal and judicial ethics, Professor Richard W. Painter,² who concluded "that Justice Karmeier should not recuse himself from this case." Resp. App. 2a.

The Illinois Supreme Court denied Plaintiffs' original motion for non-participation without opinion by Order dated March 16, 2005. Pet. App. 225. Justice Karmeier did not participate in that decision. In their Petition, Plaintiffs mischaracterize this denial as "ruling that the subject of Justice Karmeier's recusal was up to Justice Karmeier and not subject to further review by the Illinois Supreme Court." Pet. at 10. In fact, the Order makes no such ruling. Rather, the Order represents a unanimous rejection by all the participating Justices of Plaintiffs' disqualification motion.³ Pet. App. 225.

On March 22, 2005, Plaintiffs filed a motion for reconsideration, asking that Justice Karmeier recuse himself or that the Illinois Supreme Court disqualify him from participation. In their reconsideration motion, Plaintiffs accused Justice

(cont'd from previous page)

contributions and public support from lawyers." Ill. Code of Jud. Conduct Canon 7(B)(2), Ill. S. Ct. R. 67(B)(2). Likewise, the Illinois Rules of Professional Conduct permit lawyers to make financial contributions by means of a check, draft, or other instrument payable to a judge's campaign committee. Ill. R. Prof'l Conduct 3.5(h). Moreover, as discussed below (*see* Point II *infra*), courts across the country have repeatedly held that a judge's receipt of campaign contributions from lawyers or litigants does not create bias or an appearance of impropriety that would necessitate recusal.

² Professor Painter is the co-author of a leading casebook on professional ethics, as well as the author of numerous articles. When he submitted his affidavit in this case, he was the Guy Raymond and Mildred Van Voorhis Jones Professor of Law at the University of Illinois College of Law. He is now a Professor of Law at the University of Minnesota School of Law (on leave for the 2005-06 academic year). His affidavit (the "Painter Aff.") is reproduced at Resp. App. 1a-13a.

³ Justice Thomas of the Illinois Supreme Court had earlier recused himself from the case and did not participate in the decision on the merits of State Farm's appeal or in the decisions on disqualification.

Karmeier of actual bias in favor of State Farm (Resp. App. 47a-48a), a claim that Plaintiffs had previously disavowed in their original motion papers. Pet. App. 297. On May 20, 2005, the Illinois Supreme Court vacated its March 16 Order, stating that under the Illinois Rules, disqualification was "a decision exclusively within the determination of the individual judge" and that Justice Karmeier had "advised the court that he would not disqualify himself." Pet. App. 223. Accordingly, the Court denied as moot both Plaintiffs' motion for Justice Karmeier's non-participation and Plaintiffs' motion for reconsideration. *Id.*

After the Illinois Supreme Court reversed the judgment for Plaintiffs in this case, Plaintiffs made a motion for rehearing, urging as its sole ground that Justice Karmeier's participation in the decision was improper. Plaintiffs' motion for rehearing was denied by the Court without opinion on September 26, 2005. Pet. App. 222.

C. Plaintiffs' Erroneous Factual Contentions

Plaintiffs in their Petition incorrectly claim that State Farm's opposition in the Illinois Supreme Court to their motion to disqualify Justice Karmeier "did not deny, let alone refute, the factual showing made by Petitioners." Pet. at 9. In fact, State Farm's submissions to the Illinois Supreme Court showed that Plaintiffs' motion was based upon numerous, significant factual inaccuracies and distortions and implausible and unwarranted factual inferences. *See* Pet. App. 275-84; Resp. App. 22a-26a, 29a-36a.

As State Farm showed, Plaintiffs did not allege or establish any facts that would support actual bias on the part of Justice Karmeier or even an appearance of impropriety in Justice Karmeier's participation in the decision of State Farm's appeal. None of the traditional factors calling for ~~recusal~~ ~~contend~~ were even asserted by Plaintiffs. Plaintiffs did not contend that Justice Karmeier during his election campaign or at any other time expressed an opinion on the merits of